TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 478.

THE MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

GEORGE HOMBOLIS, AS ADMINISTRATOR OF THE ESTATE OF CONSTANTINE NANOS, ALIAS GUST NANOS, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

FILED MAY 26, 1913.

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1 STATE OF MINNESOTA,
County of Hennepin:

District Court, 4th Judicial District.

GEORGE BOMBOLIS, as Administrator of the Estate of Constantine Nanos, Alias Gust Nanos, Deceased, Plaintiff,
vs.
MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, Defendant.

Complaint.

For complaint herein plaintiff alleges:

I.

That at all times herein alleged this defendant was, and still is, a corporation duly organized, created and existing under and by virtue of the laws of the State of Minnesota, for the purpose of constructing, owning and operating railways in the states of Minnesota, Iowa, Missouri and elsewhere; and during all the time herein alleged, this defendant did own and operate a railroad extending in and through the states of Minnesota, Iowa, Missouri and other states.

2 II.

That on the 22nd day of May, 1912, at the city of Minneapolis, county of Hennepin, state of Minnesota, through the negligence of this defendant and its employes as hereinafter alleged, the said Constantine Nanos, also known as Gust Nanos, without negligence on his part, received personal injuries resulting in his death soon thereafter.

III.

That upon application duly made in the Probate Court in and for Hennepin county, Minnesota, this plaintiff by an order of said Probate Court, was duly made and appointed administrator of the estate of said Constantine Nanos, alias Gust Nanos, deceased, and on the 2nd day of December, 1912, plaintiff duly qualified as the administrator of said estate, and ever since has been and still is the duly qualified administrator of said estate, and ever since has been and still is acting as such.

IV.

That at the time the said Constantine Nanos received said injuries and came to his death, he was in the employ of this defendant company in the capacity of laborer in the repair of the roadbed and tracks of said defendant company, in the city of Minneapolis, Minnesota, which said tracks and roadbed were used by said defendant company

for the hauling of freight and passengers from the state of Minnesota and states further east and west, through the state of Iowa, destined with other freight to the states of Iowa, Missouri and other
3 states south and west, and was hauling freight and passengers from the states of Iowa, Missouri and other states south and west upon said tracks and roadbed, to the state of Minnesota, the said defendant being engaged at said time in the operation and use of said tracks as a common carrier by law, engaged in commerce between several states of the union, and especially between the states above mentioned, and at the time the said Nanos received said injuries and came to his death he was employed by this defendant in such interstate commerce, and this plaintiff brings this action under and pursuant, and by reason of, the facts herein alleged, and the law of the United States as provided in Volume 35, U. S. Statutes at Large, Chapter 65, and acts amendatory thereof.

V.

That on the 22nd day of May, 1912, at the time the said Nanos received said injuries and came to his death, as herein alleged, he was acting for this defendant as its servant in the capacity of a laborer on its tracks and roadbed, in the city of Minneapolis, Minnesota, and at said time and place, through the negligence of this defendant and the employes of the defendant engaged in operating a train engaged in said commerce, and especially through the negligence of the defendant's engineer and fireman in charge and control of an engine of the defendant company, the said engine came into collision with the said Nanos, and in and by reason of said collision the
4 said Nanos received personal injuries resulting in his death as herein alleged.

VI.

That while the said Nanos was engaged in the repair of one of the tracks of said railroad company, it became necessary for him in the discharge of his duty to the said defendant, to remove certain ties then lying upon said track, from said track before a train then coming towards the station of said defendant company at the city of Minneapolis along said track, at a great speed, could or would strike said ties, if such ties were allowed to remain on said track, and while the said Nanos was in the act of so removing said ties from said track, the defendant was so negligently and carelessly operating an engine and train on an adjoining track, and without any warning or notice whatever to said Nanos, and without any fault on the part of said Nanos, said other engine so operated on the said adjoining track came into collision with said Nanos, while he was in the act of so removing said ties from the main track of the defendant, causing him to sustain injuries resulting in his death on said day.

VII.

That at the time said Nanos came to his death he was strong and robust in health, and of the age of thirty-eight years, and had he not

received the injuries resulting in his death as herein alleged, would in all probability have lived for a period of forty years more than he did live and he was earning wages at said time, and capable
5 of earning wages and money, at about sixty dollars per month, and defendant could, and would, have earned the sum of least sixty dollars per month during the remainder of his natural life.

VIII.

That the said Constantine Nanos left surviving him Vagelio Nanos, his wife, thirty-three years of age and three children by his marriage to her, namely: Katherine, a daughter eight years of age; Stavroula, a daughter five years of age, and Argerios, a son, one year of age, said Constantine Nanos and said Vagelio Nanos having been married for a considerable time, and having lived together continuously as husband and wife from the date of their marriage. That the said Constantine Nanos devoted the whole of his wages and earnings to the maintenance of a home and to the support of himself and his said family, and had he not come to his untimely death, as herein alleged, would have continued to have applied all his earnings to the support and maintenance of himself and his said family consisting of his wife and his said three children, which would have been of the value to them during the lifetime of all of them, of at least the sum of twenty-five thousand dollars, and in the death of said Constantine Nanos, through the negligence of this defendant and its employes as herein alleged, damages have resulted to the said Vagelio Nanos, as the wife of the deceased, and the said Katherine, Stavroula and Argerios Nanos, as the children of said deceased, in the sum of twenty-
6 five thousand dollars. That this action is brought by the plaintiff in his representative capacity as administrator of the estate of said Constantine Nanos, also known as Gust Nanos, for the benefit of the said Vagelio Nanos, the widow of said deceased, and said Katherine, Stavroula and Argerios Nanos, the children of said deceased.

Wherefore, plaintiff prays for judgment against the defendant for the sum of twenty-five thousand dollars, together with the costs and disbursements of this action.

GEO. B. LEONARD,
Attorney for Plaintiff.

700 Andrus Building, Minneapolis, Minn.

STATE OF MINNESOTA,
County of Hennepin:

District Court, 4th Judicial District.

GEORGE BOMBOLIS, as Administrator of the Estate of Constantine Nanos, Alias Gust Nanos, Deceased, Plaintiff,
vs.
MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, Defendant.

Amended Answer.

Comes now the above named defendant and for its amended answer to the plaintiff's complaint made pursuant to the order of the court herein, of date November 24th, 1913, respectfully states as follows:

1. This defendant admits the allegations contained in the first subdivision of the plaintiff's complaint except that part which alleges that it owns and operates railways in the state of Missouri, and as to such allegation, it denies the same.

2. That as to whether or not heretofore the Probate Court in and for Hennepin county, Minnesota, made an order appointing
7 the said George Bombolis administrator of the estate of said Constantine Nanos and as to whether or not on the 2nd day of December, 1912, said plaintiff duly qualified as such administrator, this defendant has not examined the records and has no independent knowledge or information upon the subject, and will therefore require from plaintiff proof of said facts upon the trial.

3. This defendant admits that during the time stated in the plaintiff's complaint it was and is a common carrier and was and is engaged in interstate and intra-state commerce and during the times mentioned in said plaintiff's complaint it was using the tracks therein described in its business of conducting and carrying on said commerce. Admits the plaintiff's intestate was in defendant's employ at the time stated.

4. Except as hereinbefore admitted, this defendant denies each and every allegation in said plaintiff's complaint contained and each and every part thereof.

5. Further answering said complaint, this defendant alleges that if the said plaintiff's intestate at said time and place received any injuries, that the same were the result of the ordinary risks of the business as the same was then conducted and carried on by this defendant, and constituted one of the risks assumed by the plaintiff's intestate in the work which he was performing at said time and place.

6. Further answering said complaint, this defendant al-
8 leges that if the plaintiff's intestate at said time and place suffered any injuries that the same were due solely to a failure on the part of said plaintiff's intestate to observe for his own safety ordinary care, and that such failure on the part of said plain-

tiff's intestate to use ordinary care and safety was one of the proximate or contributing causes of any injuries received by him.

7. And for further answer to said complaint this defendant respectfully states that heretofore and on the 14th day of August, 1912, one John F. Bernhagen, an attorney at law of said county of Hennepin, state of Minnesota, was by Probate Court of said county of Hennepin duly appointed as special administrator of the estate of said Gust Nanos, deceased. That the said John F. Bernhagen thereafter gave bond, as required by law, the amount and sufficiency of which was approved by the said Probate Court, and duly qualified as said special administrator of the estate of said Gust Nanos, deceased. That thereafter negotiations were entered into between the said John F. Bernhagen as special administrator of the estate of said Nanos and this defendant, with respect to said matter, the said Bernhagen as special administrator contending that this defendant was liable in damages for the death of the said Nanos because of negligence on its part contributing to the injuries causing said death, and this defendant contending that it was in no wise responsible and was not guilty of any act of negligence or failure of duty which it owed to the said deceased, but that the latter
9 received the injury causing his death as a consequence of his own carelessness or failure to exercise due care.

8. That for the purpose of compromising, adjusting and settling said matter of controversy between the said John F. Bernhagen, special administrator, and this defendant, it was finally agreed between said parties that this defendant should pay in full compromise, settlement, satisfaction and discharge of any and all liability claimed against it on account of the matters aforesaid, the sum of seven hundred ($700.00) dollars, and the said John F. Bernhagen, special administrator, agreed to accept said sum for the purposes aforesaid, and thereupon this defendant paid to the said John F. Bernhagen as special administrator, for the purposes stated, the sum of seven hundred ($700.00) dollars lawful money of the United States, and the said John F. Bernhagen as special administrator received and accepted the same for the purposes stated and executed to the defendant in due form a receipt for the said money, and in and by said document acknowledged that he received the same in payment, satisfaction and discharge in full of all claims, demands, rights of action or otherwise of the estate of the said Gust Nanos, deceased, and all and every other person or persons interested or claiming an interest therein, and thereby released and discharged this defendant from all and every claim of whatever kind or character growing out of or connected with the matters hereinbefore set forth.

10 9. Further answering said complaint, this defendant alleges that said plaintiff's intestate, at the time he came to his death, was a subject of the King of Greece and owed his allegiance to the said King of Greece and was not a citizen of the state of Minnesota nor of the United States, and that if the said plaintiff's intestate left surviving him a wife and children, that said wife and children were subjects of the King of Greece and owed and now

owe their allegiance to the said King of Greece, and were not then and never have been citizens of the state of Minnesota nor of the United States.

Wherefore, defendant prays that plaintiff take nothing by his said action, that the same be dismissed, and that this defendant have and recover of the said plaintiff as administrator its costs and disbursements herein as provided by law.

W. H. BREMNER,
Defendant's Attorney.

STATE OF MINNESOTA,
County of Hennepin:

District Court, 4th Judicial District.

GEORGE BOMBOLIS, as Administrator of the Estate of Constantine Nanos, Alias Gust Nanos, Deceased, Plaintiff,
vs.
MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, Defendant.

Reply.

Replying to the answer herein, the plaintiff:

1. Denies each and every allegation contained in the paragraphs therein respectively numbered "5" and "6".

2. Denies any knowledge or information sufficient to form a belief of any of the allegations contained in the paragraphs in the said answer respectively numbered "7" and "8."

3. Further replying to the said answer, the plaintiff al-
11 leges and respectfully shows to this court, on information and belief:

That the defendant through its agents conspired with John F. Bernhagen, the alleged special administrator mentioned in the said answer, to defraud the widow and children of the above named deceased, out of their damages in this action prayed for. That for said fraudulent purpose the defendant induced said John F. Bernhagen falsely to represent to the Probate Court of the county of Hennepin that he was the next best friend of the widow and children of the said decedent, that there was no other friend of the said widow or children, and that it was necessary that said John F. Bernhagen should be appointed special administrator of the said estate. That said representations made to the said Probate Court were severally false and untrue, and were made by said John F. Bernhagen knowing them, and each and every of them, to be false and untrue, at the instance and connivance of the defendant, who then and there knew said statements, and each and every of them, to be false and untrue. That in truth and in fact the said John F. Bernhagen was not a friend of either the said widow or the said children; that there were a number of friends of the said widow and children, at all times herein stated, residents of the said county of Hennepin, among whom this plaintiff is one; that said friends of

said widow and children were at all times proper persons, competent and ready and willing to act as special administrator, or administrator, of the said estate; that it was at no time necessary to appoint said John F. Bernhagen special administrator of the said estate, and that said John F. Bernhagen had no interest whatever therein, except to defraud said widow and children as herein set forth.

That the Probate Court relying on the truth of said statements, and believing them to be true, did grant a form of order assuming to appoint said John F. Bernhagen special administrator of the estate of said decedent. That neither the widow nor the children of said decedent had any notice whatever of the said fraudulent proceedings in the Probate Court, or of the said alleged appointment of said John F. Bernhagen as special administrator. That thereupon, and on the very day of his said alleged appointment as special administrator, and within a few hours thereafter, the said John F. Bernhagen and the defendant, in furtherance of their conspiracy to defraud said widow and children as aforesaid, assumed to make a fraudulent and unconscionable settlement, which in fact had all been prearranged by the defendant and the said Bernhagen, satisfying, discharging and releasing the defendant of all liability and of any claim of the said widow and children for damages sustained by them by reason of the negligence of the defendant set forth in the complaint, the several allegations of which are hereby made part hereof.

That the said alleged release or discharge was executed without the knowledge of the said widow or children, or any of them, and that the said acts of the said John F. Bernhagen in assuming to release and discharge the defendant were never ratified, acknowledged, recognized or acquiesced in by either the said widow or said children or any of them, or by this plaintiff. That the said widow and children immediately upon obtaining knowledge of the said alleged release repudiated the same, and that this plaintiff immediately upon being appointed administrator of the said estate repudiated the same.

That the pretended consideration of seven hundred dollars for the said discharge and release therein set forth, if such consideration was paid over to the said special administrator, is wholly inadequate and unconscionable. That no part of the said sum of seven hundred dollars has ever been paid to either said widow or to the said children, or to any of them, or to the plaintiff. That no consideration whatever was paid for said alleged release and discharge, and that the said alleged release and discharge was executed for the sole purpose of cheating the said widow and children as aforesaid. That the defendant well knew at the time of the execution of said release that it was executed for the sole purpose of defrauding and cheating the said widow and children, and that the defendant did then and there connive at and take part in said fraud. That the consideration paid by the defendant to the said John F. Bernhagen was not a consideration for the said release and discharge, but for his services rendered the defendant as aforesaid, and for the purposes aforesaid.

Wherefore, plaintiff asks judgment as prayed for in his
14 complaint.

Dated December 2nd, 1913.

GEO. B. LEONARD,
Attorney for Plaintiff,
700 *Andrus Building, Minneapolis, Minn.*

STATE OF MINNESOTA,
County of Hennepin:

District Court, 4th Judicial District.

GEORGE BOMBOLIS, as Administrator of the Estate of Constantine Nanos, Alias Gust Nanos, Deceased, Plaintiff,
vs.
MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, Defendant.

Settled Case.

The above entitled cause came on for trial on the 28th, 29th and 30th days of April and the 1st and 4th days of May, 1914, before Hon. Charles S. Jelley, one of the judges of said court, and a jury; Messrs. George B. Leonard and M. Rose appearing as attorneys for the plaintiff and W. H. Bremmer, Esq., appearing as attorney for the defendant, when the following proceedings were had:

Opening Statement of Mr. Leonard to the Jury.

May it please the Court and Gentlemen of the Jury: As you are already informed this is an action brought by George Bombolis, as administrator of the estate of Constantine Nanos, who is also known as Gust Nanos, against the Minneapolis and St. Louis Railway Company to recover for damages which we claim were sustained by the negligence of the railway company. It is our contention that upon the 22nd day of May, 1912, and for some time prior to that time Gust Nanos was in the employ of the Minneapolis and St. Louis Railway Company, which is not disputed, and he was engaged
15 at work in the yards of the defendant located between Cedar Lake and Lake of the Isles. Gust Nanos was in the city or in this country only about five months. He had lived in a village in the old country, in Greece, with his wife and three children, who at the time of his death was eight, five and one years old respectively. He left them with his wife. He came here and worked with a nephew also by the name of Nanos in the same yards, and some other man who came for the same purpose. There was a gang of about eight or ten men engaged in the same work, and some of them came before him and some came about the same time that he did. It is undisputed in this case that on the 22nd of May, 1912, while repairing one of the main tracks on the railroad in the defendant's yards, he was hit by an engine and as a result of those in-

juries he died shortly afterwards. We contend that it was then engaged in interstate commerce, which is admitted. We bring this action under what is known as the "Federal Employers' Liability Act," an act passed six years ago for the protection of railroad people working for railroad companies engaged in interstate commerce, and it was then engaged in interstate commerce, which is admitted. We shall show you that on the 22nd day of May some eight or ten men started to work on these railroad tracks, especially north and south, northeast and southwest, and at the place of the accident there are three tracks about nine to nine and a half feet apart, that is each track, each track being about the usual standard width, about
16 four feet and eight inches, or about five feet wide, and that there were three tracks, two main tracks and one known as a side track, and with reference to the place of the accident the side track ran into another track known as the switch track within maybe one hundred feet, three or four rail lengths, and this switch track was towards town, that is towards north. We will show you that the two main tracks are nearest towards the lake, and this switch track was towards Lake of the Isles, being more to the east; that of the two main tracks one was being used for passenger and freight, for incoming trains, and the other track for the outgoing. That on that day at about two or half past two, or thereabouts, Gust Nanos was engaged with other workmen, and more especially in pulling out old ties, straightening out the track, and that in the process of pulling out these ties was two men pulling out the spikes that held the tie fastened to the rail, loosening the dirt around the tie, and then after the tie was ready to be removed one man would throw his pick into the furthermost end of the tie and the other one would throw his pick into the tie, and they would change positions two or three times until the tie was pulled out, and these picks would be pulled out on account of the rails obstructing the further movement of the picks and ties until the tie was pulled out, and this was the manner of pulling them out, and then it was the duty of the employes to straighten out these ties so that the trains wouldn't strike the ties, and it was their duty after they pulled out the tie to straighten
17 it out so it would lay between two tracks. About half past two he was engaged in doing that very work with another man, and that further towards town, maybe a rail length, in the direction towards north there was another two men, and further on another two men. But just about the time they were commencing to pull out this tie they heard the whistle of a freight train. We will introduce here the location of the accident, showing three tracks and the direction. There is a crossing six or seven hundred or more feet away from town, this map illustrating the three tracks, this being the main track going towards St. Louis Park out of town, the main track towards Minneapolis, and the last track being the switch track and being close to Lake of the Isles. That on this day Nanos was engaged here, somewhere here, pulling out these ties on the middle track, and that about seven or eight hundred feet from the crossing where the freight engines come in; there was a freight train coming towards town on the very track that he was working on; that he and

his partner pulled out this tie, and just about the time the train was getting very close it became their business to turn the tie in this manner (indicating), the length of the tie being about the width of the distance between these two tracks, and it became necessary to turn the tie this way, one man took hold of one end of the tie and the other man took hold of the other end, and just about the time that was done a switch engine, without any warning, caught
18 him on the left thigh, breaking his left thigh, throwing him down and causing him other internal injuries, and the result was—I don't go into detail—he died. This substantially is the main part of the claim of the plaintiff; that the defendant company was negligently operating a switch engine on this switch track, with a few cars, with the tender of the engine towards Nanos. Nanos didn't know that the switch engine was coming toward him and was engaged in pulling out this tie so that the freight train could go on the other track. We will show you that he was about to be taken down to the hospital, or either was taken down to the hospital direct and from there to the morgue, and directly to the morgue, and that an examination was made by the coroner of this county, and we will show the injuries in general. About that time Nanos was in good health; he was 38 years old and was supporting his family. He had just commenced to work for the St. Louis Railroad Company and was earning in the neighborhood of 75 or 80 dollars a month, or thereabouts. I don't know whether that is disputed or not. He was buried in this city by relatives. He had at that time a relative in Iowa, who came here; he had also another relative, a brother of this nephew who was in Fort Madison, Iowa, who was in this city and also worked. And here, while it is not a part of our main case, and inasmuch as I will not have an opportunity to talk to you again before the case is closed, it is my duty to call your attention again to the defendant company. They at first say it wasn't their fault and that he was guilty
19 of negligence himself; and the other defense is, that on the 14th day of August, of the same year, one John F. Bernhagen, an attorney in this city, was appointed special administrator. We will show you under the laws of this state that special administrators are appointed under the law only on petition by a friend or relative. That he had himself appointed, and on the same day, without consulting the widow and the children, without consulting any of the relatives, and without knowing there were any children, in collusion with the claim department of the Minneapolis and St. Louis railroad effected what they claim a settlement, if such a settlement was made, they claim they made a settlement. We will show you that subsequently the widow through the Greek consul who represented that government in Chicago, had an administrator appointed in this city for the purpose of bringing this action. This action cannot be brought by any person excepting under the law, this federal law, excepting by the representative of the deceased, and Mr. Bombolis commenced this action on behalf and for this widow and children. We will show you that the widow never got one dollar, and we ask you to set aside this release and alleged settlement, which was fraudu-

lent, and determine this case on the evidence, on the evidence of the plaintiff who was in the employ of the company in question at the time the accident occurred.

Mr. Bremner: You do not question but that Mr. Bernhagen was appointed as special administrator by the Probate Court, and
20 did make a settlement of the claim with the company as special administrator?

Mr. Leonard: No, we question that. We say if he was appointed special administrator and if he did make a settlement, it was fraudulent and in collusion with this company to effect it.

Mr. Bremner: Do you question that the Probate Court records of this county show that Mr. Bernhagen was appointed by Judge Smith as special administrator of Constantine Nanos, the deceased?

Mr. Leonard: Well, I don't know that.

Mr. Leonard: Will you admit the appointment of Mr. Bombolis as general administrator?

Mr. Bremner: Yes, we will admit that.

GEORGE BOMBOLIS, after being first duly sworn, testified as follows:

Examined by Mr. Leonard:

Q. Mr. Bombolis, you are the plaintiff in this action? Your name is George Bombolis?

A. Yes.

Q. You are bringing this action on behalf of the widow and children of Gust Nanos?

A. Yes.

Q. How old are you?

A. About fifty-four.

Q. How long have you lived in this country?

A. Well, I be in this country twenty-six years.

Q. How long in this city?

A. Seven.

Q. What business are you engaged in?

21 A. I am working in imported and domestic groceries.

Q. Where is your place of business?

A. 248 Second avenue south.

Mr. Leonard: I now offer Plaintiff's Exhibits A, B and C in evidence, being respectively letters of administration, oath of administrator, and administrator's bond.

Mr. Bremner: Defendant admits the appointment of Mr. Bombolis as general administrator of the estate of Constantine Nanos or Gust Nanos, whichever is the correct name.

The Court: There is no objection; they will be received.

Q. You are still the administrator of the estate?

A. Yes.

Cross-examination.

By Mr. Bremner:

Q. You say you bring this action on behalf of the widow and three minor children?
A. Yes.
Q. Of the deceased?
A. Yes.
Q. Where does the widow live?
A. She lives in Greece.
Q. She lives in Greece?
A. Yes.
Q. She is a citizen of Greece, the widow?
A. No.
Q. She isn't a citizen of Greece? She is a resident of Greece?
A. Yes, lives in Greece.
22 Q. And the three children live with her in Greece?
A. Yes.
Q. They are Greeks by birth, do you know?
A. I don't understand.
Q. Born in Greece?
A. Yes.
Q. They are subjects of the King of Greece?
A. What is it?
Q. The widow and the three children are subjects of the King of Greece?
A. Yes, sure.
Q. And were during all of the time that Gust Nanos was in this country?
A. Well, I can't tell about that——

Mr. Leonard: Wait. That is objected to as incompetent, irrelevant and immaterial.

The Court: At the time of the accident was this widow and these children living in Greece?
Mr. Leonard: Yes.
Q. His widow and children have never been in this country at all?
A. No.

Mr. Bremner: That is admitted, is it, it is admitted they were subjects of the King of Greece during all of this time?
Mr. Leonard: Yes.

ALEX NANOUS, after being first duly sworn, testified as follows:

Examined by Mr. Leonard:

23 Mr. Bremner: In view of the admitted facts that the four parties for whom this action is brought were at the time of the accident, and are now, and were during all of the time that Mr. Nanos was in the United States, residents of Greece and sub-

jects of the King of Greece, I believe we can shorten this case very materially by submitting at this time a motion to dismiss. We desire at this time to submit to the court a motion to dismiss the action, on the ground that the admitted facts show that the parties for whom this action is brought are and were at the time of the action non-resident aliens and that therefore there can be no recovery on their behalf—add to that motion—under the federal act commonly known as the 'Federal Employers' Liability Act."

Mr. Leonard: It is admitted, as I understand by counsel for the defendant, that at the time of his death Constantine Nanos left surviving him a widow, whose name is set forth in the complaint, Vagelio Nanos, living in Thessaly, Greece, age 33——

Mr. Bremner: We are not admitting that at all; we don't need to admit that.

The Court: Is it admitted that the decedent was not a citizen of this country, he was never *neutralized*?

Mr. Bremner: It is a fact that Mr. Nanos at the time of his death wasn't *neutralized* and that he still remained a Greek subject.

Mr. Leonard: That isn't in issue here, it is immaterial.

Court adjourned.

24 Pursuant to adjournment the court convened at 10 A. M., April 29th, 1914.

The Court: The motion will be denied.

Mr. Bremner: Exception.

Q. Your full name is Alex Nanous?
A. Yes.
Q. How old are you?
A. Twenty-four.
Q. Where do you live?
A. Fort Madison, Iowa.
Q. How long have you lived there?
A. Two years and four months.
Q. Two years and four months?
A. Yes.
Q. Before that where did you live?
A. I was here in Minneapolis.
Q. What are you doing at Fort Madison?
A. In dry cleaning and tailoring business.
Q. What did you do in Minneapolis?
A. I used to work for the Minneapolis and St. Louis Railroad Company.
Q. This defendant?
A. Yes.
Q. How long did you work for them?
A. About a year.
Q. Where?
A. In Kenwood and all that yard down there.
Q. What did you do for the company?
A. Section hand.

Q. Working on what?
A. Well, repairing the tracks.
Q. I will ask you if you are familiar or not—withdrawn.
25 Q. Did you know the deceased in his lifetime, Constantine Nanos?
A. I saw him when I left.
Q. Where?
A. In Greece.
Q. When was that?
A. That was in 1907.
Q. Where did he live?
A. In Greece, out on a farm, the small village of Sesklo.
Q. In what province is that?
A. I don't understand that.
Q. What state?
A. Thessaly.
Q. And were you related to him or not?
A. Yes, sir.
Q. What relationship to you?
A. He was my uncle.
Q. Is he a brother or your mother or of your father?
A. My father.
Q. Do you know how old your uncle was when he died?
A. When he died?
Q. Yes?
A. He was about thirty-eight.
Q. I will ask you if you know whether he was married?
A. Yes.
Q. What is the name of his wife?
A. Vagelio.
Q. About how old is she?
26 A. Oh, about thirty-two or thirty-five, I don't know exactly.
Q. Did he have any children?
A. When I left he had only one.
Q. What is her name?
A. Katherine.
Q. She was a girl?
A. Yes.
Q. How old is she now?
A. Well, she was about three years old when I left; she is about ten or eleven years old now.
Q. Did you see his other children?
A. No, I did not.
Q. Did you see him before he died?
A. No.
Q. Did you see him after he died?
A. Yes.
Q. Were you at his funeral?
A. Yes.
Q. Was he buried here?

A. Yes.
Q. Where?
A. Out at the Catholic cemetery.
Q. Did you have any relatives here in this city at the time?
A. Yes, and I got a brother here, too.
Q. While you were working for the Minneapolis and St. Louis Railroad Company in its yards in this city I will ask you if you know what the custom was with the railroad company in reference to running its switch engines in the yard and its signals with
27 regard to men that were working on the tracks?

Mr. Bremner: That is objected to as incompetent, irrelevant, immaterial and relating to a time other and different from the time the accident occurred.

Mr. Leonard: Question withdrawn.

Q. You say you have lived in Fort Madison, Iowa, two years and four months?
A. Yes.
Q. And you worked for the Minneapolis and St. Louis here?
A. Yes.
Q. Do you remember when you quit?
A. In January.
Q. What year?
A. 1911.
Q. This is 1914.
A. In 1911; it is three years since I left.
Q. Is it three years last January?
A. 1911, in January.
Q. It was in the month of January?
A. Yes, the last of the year.
Q. The first of the year?
A. The first of the year, yes; I mean in December, not January, the last of the year.
Q. The last of the year?
A. Yes.
Q. Two years ago last December?
A. Two years ago; going on three years.
Q. Then you worked for the Minneapolis and St. Louis railroad until December, 1911?
A. Yes.
28 Q. How long did you work for them continuously?
A. Well, I don't know exactly.
Q. How long?
A. About a year, I don't know, I ain't sure I worked quite a year, maybe I worked eleven months.
Q. About a year.
A. Yes.
Q. Did you work anywhere else than the Kenwood yards?
A. Sure.
Q. What yards?
A. Well, up there.

Q. Up where?
A. From Kenwood clear to the roundhouse on the other side.
Q. And during these eleven months while you were working in the yards you were working on the tracks you say?
A. Yes.
Q. Did you not see switch engines in the yards while you were working there during that time?
A. Lots of them every day.
Q. And during that time do you know what the custom was of the railroad company with reference to giving any signals to the men who were working on the tracks?

Mr. Bremner: That is objected to as incompetent, irrelevant, immaterial and this is relating to a time long anterior to the time in question.

The Court: Objection overruled.
29 Mr. Bremner: Exception.

A. Yes.
Q. State what the custom was.

Mr. Bremner: Same objection.
The Court: Objection overruled.
Mr. Bremner: Exception.

A. To ring the bells.

JAMES ANGELO, after being first duly sworn, testified as follows:

Examined by Mr. Leonard:

Q. Mr. Angelo, your full name is James Angelo?
A. Yes.
Q. How old are you?
A. I am twenty-five.
Q. Twenty-five?
A. Yes.
Q. Where do you live?
A. I live on Ninth street.
Q. What do you do for a living? What do you work at?
A. I work at the Radisson hotel.
Q. What do you do at the Radisson?
A. I work in the baker shop.
Q. How long have you worked for the Radisson?
A. Twenty days.
Q. And before that where did you work? Where were you before that? Where were you before you went to work for the Radisson—at the Rogers?
A. No.
30 Q. Were you in this country and the old country?
A. Well, in the old country.
Q. When did you come from the old country?
A. I got now twenty-five days.
Q. How long were you in the old country?

A. About fifteen months.
Q. And before that were you in the United States?
A. Yes.
Q. How long before were you in the United States?
A. Two years and a half.
Q. That is then you went to Greece about sixteen months ago?
A. Yes.
Q. You went to the war and then come back?
A. I come back.
Q. Before you went to Greece where did you work?
A. I worked for the Minneapolis and St. Louis yards.
Q. In the Minneapolis and St. Louis Railway Company's yards?
A. Yes.
Q. In this city?
A. Yes.
Q. Is that known as the Kenwood yards?
A. Yes.
Q. How long did you work for the Minneapolis and St. Louis Railroad Company?
A. About a year.
31 Q. About a year?
A. Yes.
Q. What did you do for the railroad company?
A. I worked on the railroad track.
Q. What did you do on the railroad track?
A. I pulled ties, rails and everything.
Q. Pulled out old ties and put in new ties?
A. Yes.
Q. And changed rails?
A. And changed rails.
Q. And did you work for the railroad company on the 22nd day of May when Gust Nanos was killed, did you work in those yards?
A. Yes.
Q. How many of you were working in the yard?
A. How?
Q. How many?
A. Oh, about ten or twelve maybe; twelve.
Q. And did you all work at the time this accident occurred?
A. Yes, sir.
Q. All the ten or twelve?
A. Yes.
Q. Was the foreman there?
A. No.
Q. The foreman wasn't there?
A. No, sir.
Q. Was the boss there, the section foreman?
A. Yes.
Q. Was he there?
A. He was there.
32 Q. Where did you start that morning, in which way were you working up? Come here. I will show you these three

tracks. Here is the main track going west, out of town; this is the track where trains go to town, to Minneapolis; here is the sidetrack, and here is the switch. Do you remember that?

A. Yes.

Q. Now which way were you pulling out your ties, from this side towards town or did you start from town that way that morning? What track did you work on?

A. The middle track.

Q. And what were you doing that day?

A. Oh, we pulled old ties out and put in new ties.

Q. Who was your partner?

A. My partner was Jim Efthimiou.

Q. Is that the man sitting over there?

A. Yes, he is the man.

Q. That is, there would be two to each tie that would be pulled out?

Mr. Bremner: That is objected to as leading.

The Court: Let him tell.

Q. How many men would pull out one tie?

A. Two men.

Q. And how would you do it; how did you pull out a tie? What would you do to pull out a tie—with a shovel or an ax?

A. No; with picks.

Q. What would you do with the picks?

A. I pulled the ties out.

Q. Show us what you would do?

33 A. I would do that way, hit the tie.

Q. How many times would you hit the tie before you would pull it out?

A. Two or three times.

Q. Who was Gust Nanos' partner?

A. Christ.

Q. Is that the man sitting over there?

A. Yes, he is the man, Christ.

Q. I will ask you who was nearer the switch, the place where the switch runs into the sidetrack; or who was nearer to town, to Minneapolis, you or Gust?

A. I was on the middle track and the other boys on the sidetrack.

Q. You worked on the middle track?

A. Yes.

Mr. Bremner: Where were the other boys?

A. The other track.

Mr. Bremner: What do you mean by the other track?

A. The sidetrack.

Q. Where was the other boys pulling out ties?

A. Somewheres in the middle track, and some of the boys on the sidetrack.

Q. Were there any ties being pulled out on this sidetrack on that

day? Do you know if any ties were being pulled out on the sidetrack? Do you understand my question?

A. No.

Q. You say you were pulling out ties on the middle track?

A. Yes.

34 Q. Were there any ties pulled out on this track, marked "St. Louis Park" track?

A. Yes.

Q. On that day?

A. Yes.

Q. Were there any pulled out on this track?

A. No.

Q. How about the sidetrack; were there any ties pulled out on that?

A. Yes.

Q. Did you pull any ties on that track that day?

A. Yes.

Q. Which track did you work on that day?

A. On the middle track.

Q. How long did you work there?

A. Oh, half a day.

Q. Did you work on this track, this sidetrack on that day?

A. Me?

Q. Yes?

A. On the two tracks you know.

Q. Do you understand my question? You say you worked half a day on the middle track?

A. Yes.

Q. Did you work on that day on any other track—on the west bound track or the sidetrack?

A. No; just on the middle track.

Q. Do you know—did you see switch engines in the yards during that year that you worked there?

35 A. No, I didn't see the switch engines in the yard.

Mr. Leonard: I am afraid I will have to get an interpreter, he doesn't seem to understand me.

Witness examined by the Court:

Q. Don't you understand the English language?

A. Yes.

Q. Can't you tell here with reference to this map where you were working on that day, and what you did?

A. I worked there that day.

Q. You know which track you worked on on that day, don't you?

A. I worked there.

Q. You can tell, can't you?

A. I can't tell.

Q. Mr. Leonard puts the questions to you plainly enough, don't you understand them, can't you answer his questions?

A. No, sir.

Mr. Leonard:

Q. How long were you in the United States before you went to war?

A. Two years and a half.

Q. What did you do for that two years and a half?

A. I worked about a year in the Minneapolis and St. Louis yard, and a year maybe here——

Q. Could you talk English better before you left than you talk now?

A. Oh, not very much, just a little bit.

The Court:

36 Q. You know what a locomotive is, don't you? You know it is an engine that pulls the cars, don't you?

A. I don't know.

Mr. Leonard: He doesn't understand the question; probably he knows what it is.

The Court: Very well, swear an interpreter.

EMANUEL S. JOHANIDES, sworn as interpreter.

Mr. Leonard, continuing:

Q. How long did you work for the Minneapolis and St. Louis railroad?

A. I worked for it one year.

Q. And was this all the time in the Kenwood yards or not?

Interpreter: He wants to know whether it was during that year?

Q. Yes, during that year?

A. Yes.

Q. Did you see any switch engines during that year on the tracks, and switch trains?

A. Yes, sir.

Q. What did you do, what kind of work did you do while you worked for the Minneapolis and St. Louis railroad?

A. We used to take out old ties, put in new ones, and change rails and so on.

Q. That is you were working on the tracks of the company?

A. Yes, sir.

37 Q. Do you know what the custom of the railroad company was with reference to giving any signals to the men who were on the tracks by locomotive engines?

Mr. Bremner: That is objected to as incompetent, irrelevant and immaterial.

The Court: Objection overruled.

Mr. Bremner: Exception.

A. Yes, I know.

Q. What was it?

Mr. Bremner: Same objection.

The Court: Same ruling.
Mr. Bremner: Exception.

A. To ring the bell whenever they saw any man *in* the track.
Q. On this day which track were you working on?
A. On the middle track.
Q. When I say this day, I mean the day when Gust Nanos was killed?
A. That is the day.
Q. With reference to the switch in the sidetrack; about how far from the switch did you work on the middle track? With reference to the switch stand on the sidetrack, how far from this switch stand did you work?
A. About three rails apart from it.
Q. Away from town or towards town?
A. Towards town.
Q. Step down here. This is the switch track and this is going towards town?
A. Yes.
38 Q. Was it beyond the switch towards town that you worked or away from the switch?
A. Towards the other side.
Q. When you say the other side, do you mean——

Mr. Bremner: There isn't any question about where these men were working on that day; they were working south of that switch.
Mr. Leonard. These tracks for the purpose of this record will be referred to as running north and south, and these men were working south of the switch track.
Mr. Bremner: The middle track is the northbound main; the west track is the southbound main, and the switch track referred to is the lead track.

Q. How far was Nanos working from you?
A. I was on the middle track and Nanos was on the side track.
Q. How far were you from him?
A. I was on the middle track and he was on the sidetrack, there was a difference, he was a little further south from me.
Q. How far south?
A. About one rail.
Q. About one rail further south?
A. Yes.
Q. Did you see the accident?
A. I did not see the accident, but I saw the man after the accident.
Q. Were you there when the accident occurred?
A. Yes, sir.
Q. Did you see any train coming toward town—withdrawn
39 Q. Did you see any trains or any engines there about that time?
A. During the time that I was there I suppose the engine was out of the yard, I didn't see it there.

Mr. Bremner: I move to strike that out as not responsive to the question.

The Court: It may be stricken out.

Q. At the time of this accident did you see any trains passing one way or the other, and how many?

A. The freight train was coming along at the time and we got out from the track.

Q. On which track was the freight train coming?

A. On the middle track.

Q. And which way was it going?

A. Towards Minneapolis.

Q. What other train did you see?

A. I didn't see any other train; that is all I saw.

Q. Did you see any other switch train or switch engine?

A. You mean at that moment?

Q. At that moment, at the time of the accident?

A. At the time the accident happened the freight was going toward town and the other was going out the other way, the switch engine.

Q. The other train was going in the opposite direction?

A. Yes, sir.

Q. And on which track?

40 A. On the sidetrack.

Q. You say you got out of the way of the freight train; where did you go? Point on this map which side you went to get out of the way?

A. I went toward the other main track.

Q. In other words, you mean to say you went towards the southbound track?

A. I went to the southbound track.

Q. Did you hear the freight train coming towards town give any signal?

A. When it came close to us the bell was ringing and we got out of the way.

Q. Did you hear any other signal before the bell rang of this freight train?

A. The noise I heard.

Q. Did you hear the switch engine on the sidetrack ring any bell or not?

Mr. Bremner: That is objected to as incompetent, irrelevant, immaterial and not shown that this witness was in a position to hear.

The Court: Objection overruled.

Mr. Bremner: Exception.

A. I didn't hear the switch engine at all.

Q. Did the switch engine ring the bell or give any other signal?

Mr. Bremner: That is objected to as calling for the conclusion and opinion of the witness, and incompetent.

The Court: Objection sustained.

Q. Did you know that the switch engine was approaching on this sidetrack before this accident?

Mr. Bremner: That is objected to as immaterial.

41 The Court: Objection sustained.

Q. What was the first that you knew that there was an accident?
A. Somebody hollered that somebody got killed.
Q. And what did you do?
A. At that time I was levelling the dirt down, the gravel, which was in the middle of the track so as to allow the freight train to go by, and then I jumped out.
Q. Did you see any train after you jumped out?
A. I saw the freight.
Q. Did you see anything of Nanos until after the freight train had passed towards town?
A. Before the freight train went by I jumped off there towards the place where Nanos was and saw him laying on the track.
Q. Ask him this question: Did you see Nanos before the freight train going towards town had passed?
A. After the train went past there, then I went towards the place where Nanos was and I saw him laying on the track.
Q. Well, where did you see him lay?
A. It was just about between the two tracks.
Q. Which tracks?
A. The sidetrack and the middle track.
Q. And how far away from the place where Nanos had worked?
A. About a rail further or something like that.

Q. Had the switch engine stopped or not?

42 A. It stopped, but a little further away, a little further.

Q. How much further away?
A. About five rails from where it struck Gust.
Q. Did you hear this switch engine give any signal?
A. No, sir.

Cross-examination.

By Mr. Bremner:

Q. When did you commence to work for the Minneapolis and St. Louis Railroad Company?
A. I think it was in October.
Q. October of what year?
A. October of 1910.
Q. So that at the time of this accident you had been working continuously for about a year and six months?
A. I wasn't working there continuously, but I quit there and came into Minneapolis and then on the 22nd of March I went back there again.
Q. The 22nd of March of what year?
A. 22nd of March, 1911.
Q. Did you work continuously from March, 1911, to the time that this accident happened?

A. Yes, sir.

Q. So that you had been working about fourteen months then when this accident occurred?

A. I do not remember exactly; it was about a year or fourteen months.

Q. How long prior to the accident, that is for how many days had this gang been pulling ties on the main track in the neighborhood where the accident occurred?

43 A. I think we were there for two days.

Q. Now, you were taking out old ties and putting new ties into the main tracks—that is what you were engaged in, was it not?

A. That is what we were doing.

Q. And that was what the whole gang was doing, wasn't it?

A. That is what the whole gang was doing.

Q. Mr. Nanos, the man that was killed, was pulling ties out of the main track and putting new ties in the main track, wasn't he?

A. Yes, he was pulling out the old ties and putting in the new ones.

Q. In the main track?

A. In the sidetrack.

Q. He was pulling old ties out of that sidetrack and putting in new ties into the sidetrack?

A. Yes, sir.

Q. How long had he been doing that prior to the accident?

A. From the morning of that day until about noon, until noon that day when the accident occurred.

Q. How many other men of the gang were engaged in pulling old ties out of the sidetrack?

A. Two of us were working on the main line and the other eight or so of the gang were working on the sidetrack.

Q. So that eight men out of this gang according to your recollection were working on the sidetrack and only two men were working on the main line?

44 A. I don't mean that they worked there continuously but they worked on both tracks.

Q. As a matter of fact, Mr. Angelo, there wasn't a single new tie put in this sidetrack by the gang you were working with, was there?

A. Yes, sir.

Q. Weren't all the new ties put in the main tracks?

A. I do not remember very well.

Q. Now, Mr. Angelo, you heard a freight train coming from the south?

A. I didn't hear it far anyway but I saw it when it came close.

Q. And as it came close you heard the bell ringing?

A. Yes, sir; I did.

Q. And you and all of the other members of the gang excepting Nanos and one other man got off the northbound main towards the southbound main, or towards the side of the southbound main?

Interpreter: I don't understand that exactly.

Q. When you saw this freight train coming you and all of the

members of the gang except Mr. Nanos and one other man got off of this northbound main track towards the southbound main?

A. I didn't pay attention to any of the other men, but I know that my partner and I went towards the south tracks.

Q. Did you see Nanos step off of the northbound main as the freight train came along?

A. I didn't see him at all.

Q. You didn't see him at all?

45 A. No.

Q. This switch engine to which you have referred was on this lead or switch track?

A. I didn't see the engine either.

Q. Didn't you see that engine at all?

A. I saw the engine after it struck the deceased and it stopped.

Q. You didn't see the engine strike Mr. Nanos?

A. I didn't see it myself but others did.

Q. And you don't know whether the switch engine hit Mr. Nanos or the freight train hit Mr. Nanos?

A. I do not know which one of the two struck him, but from what the other fellows told me that the switch engine struck him.

Mr. Bremner: I move to strike out all statements of the witness to the effect that the switch engine struck Mr. Nanos as hearsay.

The Court: If there is any testimony of that kind it may be stricken out.

Q. When you did see the switch engine after the accident it was on the switch track?

A. It was on the switch track.

Q. And you say that you hadn't seen the switch engine prior to the time the freight train came along?

A. I didn't see the switch engine before the freight train came.

Q. And the freight train was between you and the switch engine?

A. They both came at the same time.

Q. If you didn't see this switch engine how do you know

46 they both came at the same time?

A. When the freight train went past then I saw it.

Q. So that when the switch engine did come along there the freight train was between you and it?

A. The freight train was between me and the switch engine, that is it, he says.

Q. Now, this freight train was quite a long train, was it not?

A. Quite a few cars.

Q. And it took it some time to go by?

A. Not very long.

Q. You heard the noise made by this freight train?

A. Yes, sir.

Redirect examination.

By Mr. Leonard:

Q. You said you worked for the St. Louis railroad about a year?

A. Yes, sir.

Q. How long did you work for the Minneapolis and St. Louis railroad after this accident?

A. I don't remember exactly; about four months.

Q. And before this accident how long did you work for them?

A. Since March.

Q. Since March of that year?

A. That year.

Q. During the winter preceding March you didn't work at
47. all for the Minneapolis and St. Louis railroad?

A. No, sir.

Q. Did you work for the Minneapolis and St. Louis the fall before this accident?

A. Yes, sir; during the fall.

Q. How long did you work during that fall?

A. About four months or so.

Q. And before that did you ever work for the Minneapolis and St. Louis railroad?

A. No, sir.

Q. Then you started to work in 1911 and not in 1910 the first time?

A. I do not remember exactly the date or the year.

Q. Well, it was the fall before this accident that you started to work for the railroad?

A. It was the fall before this accident happened.

Q. Now, when you jumped out of the way of this freight train which way were you facing, towards the southbound track or towards the lead track, this sidetrack?

A. I was looking at the train as it was going by.

Q. Did you jump sideways?

A. I jumped with my face forward.

Q. How far was the freight train—withdrawn.

Q. Where were you when you jumped; from what place were you when you jumped?

A. From the middle track.

Q. And where was your partner?

A. He was there too and we both jumped out at the same
48 time.

Q. How far was this freight train when you jumped out of the track?

A. About three or four rails from me.

Q. With reference to the south rail of the side-track or the lead track, how far was it near to the west rail of the lead track or near to the—with reference to the west rail—withdrawn.

Q. Now, with reference to the west rail of the sidetrack and the east rail of the middle track, which rail was the body of Nanos nearer to when you saw him?

A. It was near the western rail of the sidetrack.

GILBERT SEASHORE, after being first duly sworn, testified as follows:

Examined by Mr. Leonard:

Q. Doctor Seashore, you are the coroner of Hennepin county?
A. Yes.
Q. I will ask you if you examined the body of Constantine Nanos, also known as Gust Nanos, on the 22nd of May, 1912?
A. Yes.
Q. Did you make a memorandum?
A. Yes.
Q. Have you got that with you?
A. Yes.
Q. Will you refer to your memorandum and tell us what injuries the deceased died of from the examination you made?
A. He had a scalp wound on the left side of the head, semi-
49 lunar in shape, extending from the external angular process of the left eye upwards and backwards to the occipital region, about two and a half inches from the hair line, and the flap was reflected down so that it exposed the skull; blood was running out of the left ear. Another wound back of right ear about one and a half inches long. Left hip was fractured; the left ilium, that is the hip bone was knocked in. There was a swelling and a bruise in the small of the back on the left side. There was a separation of the sacrum with the ilium; that is the separation of the hip bone to the back bone, there was a separation of the hip bone removed from the back bone, that was on the left side. Those were the main injuries.

JAMES ANGELO, recalled:

Examined by Mr. Leonard:

(Emanuel S. Johanides, interpreter.)

Q. Did you know Gust Nanos before he came to this country?
A. Yes, sir.
Q. Do you know about how old they are?
A. The oldest one, the girl, is about ten or eleven years old.
Q. And the next to the oldest?
A. The next one is about eight.
Q. Is that a girl too?
A. Yes, sir.
Q. And the next to her?
A. The other is only about two years, two or three.
50 Q. A boy or girl?
A. A boy.
Q. Do you know their names?
A. No, sir.
Q. Do you know while Nanos lived in this village whether he lived with his family, lived with his wife and children?
A. Yes, he lived with his family.
Q. Do you know what he was doing in the old country?
A. He was a farmer.

Cross-examination.

By Mr. Bremner:

Q. In drawing ties from the lead or switch track, to which side did the men draw them?

A. I do not remember as we took any ties out of the switch track.

Q. I misunderstood you then; I understood you to testify a while ago that just before the accident happened Mr. Nanos was engaged in pulling ties out of the switch track.

A. I do not remember very well, but I know I was pulling ties out of the middle track.

Q. Do you know where Mr. Nanos was working before this accident occurred?

A. I do not remember.

Q. You won't say that he wasn't working on the main track?

A. I wouldn't swear to it.

(Recess 12 to 2 P. M.)

51 CHRIST BARAKOS, after being first duly sworn, testified as follows:

(Emanuel S. Johanides, interpreter.)

Examined by Mr. Leonard:

Q. Christ, how old are you?

A. Twenty-eight.

Q. And where were you born?

A. In Sesklo.

Q. That is in Greece?

A. Yes.

Q. How long have you been in this country?

A. Four years.

Q. What have you been doing in this country?

A. I work on the railroad.

Q. Did you work for the Minneapolis and St. Louis railroad?

A. Yes, sir.

Q. How long did you work for the Minneapolis and St. Louis railroad?

A. Three years.

Q. When did you start to work for the Minneapolis and St. Louis railroad?

A. Since 1910.

Q. Are you now working for it?

A. No, sir.

Q. How long since you stopped working for them?

A. About six or seven months.

Q. Did you work for the Minneapolis and St. Louis Railroad Company on the day of this accident, the 22nd day of May, 1912?

A. Yes, sir.

52 Q. What kind of work did you do for the railroad company?

A. Raising track, changing ties and rails.
Q. And where did you work?
A. At Kenwood.
Q. At the Kenwood yards?
A. Yes, Kenwood yards.
Q. How long did you work in the Kenwood yards before this accident?
A. About three years and a half.
Q. Before the accident?
A. About one year.
Q. One year about?
A. Yes.
Q. Did you know Gust Nanos in the old country?
A. Yes, sir.
Q. And how old a man was he when he died?
A. About thirty-two or thirty-four years old.
Q. Did you know his family in the old country?
A. Yes, sir.
Q. Did you know his wife?
A. Yes, sir.
Q. How long did you know his wife?

Mr. Bremner: We don't expect to offer any testimony which will in any way tend to rebut the testimony that you have already offered in respect to his wife and children.

Q. Did you know his wife before she married Gust Nanos?
A. She only lives about two blocks from me and I knew her.
53 Q. Were you at their marriage or not?
A. Yes, sir.
Q. That was how many years ago?
A. I don't remember exactly but I think it is about fifteen years ago.
Q. Now, Christ, did Gust Nanos work in the gang that you worked in on that day?
A. He was my partner.
Q. How many were there in this gang?
A. Eight men.
Q. And what was the gang doing on that day?
A. We were changing ties.
Q. In the changing of ties what kind of work was it necessary for you to do? Explain it.
A. We were digging gravel between the two ties, driving between the two ties, and then shoveled the dirt out of the gravel, and then took the pick and took the tie out.
Q. Before you used the pick, what did you do with the spikes that held the tie?
A. We were pulling spikes.
Q. These spikes were holding the ties to the rail?
A. Yes.
Q. And then you pulled it out with the picks?

A. Yes, we were pulling them out with the picks.
Q. You mean pulling out the ties with the picks?
A. Yes.

Q. Step up here. These are the three tracks; this is the
54 middle track that runs to the city of Minneapolis; and this track runs out of the city, it is for trains that run out of the city; and this is the lead track or sidetrack; and this is the switch stand. Now, on this side where I am pointing now is the track that comes into the city. Which of the tracks did you work on on that day?
A. The middle track.
Q. The middle track?
A. Yes.
Q. And with reference to the switch stand on the sidetrack, how far from that switch stand?
A. About one rail and a half.
Q. Where you were working a rail and a half?
A. Yes.
Q. Were you working away from town; was it away from the switch track and away from the town?
A. Yes, sir.
Q. That is to the south?
A. Yes, we were coming toward town.
Q. That is you started that morning and you were working towards town?
A. Yes, we started working toward town.
Q. You saw the witness Angelo?
A. Yes.
Q. Was he to the north of you or to the south of you, that is towards town or away from town?
A. He was away from town.
Q. Well, with reference to him, was he nearer the switch track as you remember or was he away from the switch track?

55 A. He was in the main line towards, away from town.
Q. Away from town?
A. Yes.
Q. I will ask you, do you know what the custom was of the railroad company with reference to giving any signal by passing switch engines or any engines to the men who were working on the track?

Mr. Bremner: That is objected to as incompetent, irrelevant, immaterial, and the witness isn't qualified to testify.
The Court: Objection overruled.
Mr. Bremner: Exception.

A. Yes, sir.
Q. What was it?

Mr. Bremner: Same objection.
The Court: Same ruling.
Mr. Bremner: Exception.

A. They were ringing the bell.

Q. When you say "They" you mean the engine, or what do you mean by "They"?
A. The engine.
Q. Did you see—I will ask you if all the men worked on the main track or not?
A. They all were working on the main track.
Q. How far apart were you from the others?
A. About three or four feet further from each other.
Q. And your partner was Gust Nanos?
A. Yes, sir.
Q. Did you see any trains while you were working there just before the accident?
56 A. We didn't see any train, but we heard the noise of the train that was coming.
Q. Did you get any signal from anything?
A. Yes, I did.
Q. What signal did you hear?
A. The whistling.
Q. Where was the whistling given, by what?
A. The engine.
Q. I know, but what engine?
A. The freight train.
Q. Which way was the freight train going?
A. Towards town.
Q. And on what track?
A. On the main line.
Q. Is that on the middle track, the track you were working on?
A. The middle track.
Q. How far was this freight train when it gave its whistle?
A. About ten rails far from us.
Q. What were you doing at the time you heard the whistle?
A. Well, we were trying to get the tie out.
Q. Where was the tie?
A. It was in the track.
Q. Under the rail or on top of the rail?
A. Under the rail.
Q. And what were you just doing when you say you were trying to pull it out?
A. We had the tie half pulled out.
Q. By what means? What did you have in your hand to
57 pull it out with? What did you have in your hand when you were pulling out this tie?
A. The picks.
Q. What did Gust have in his hand?
A. The pick.
Q. Where did you have your picks when you were pulling it out?
A. Gust had it stuck in the end of the tie and I had it in the middle.
Q. Which end of the tie? Let him explain what end of the tie Gust had it.
A. The outside.

Q. Which way were you pulling out the tie, towards the main track or towards the southbound track?
A. Towards the sidetrack.
Q. How far did you pull that tie?
A. We pulled it until the end of the tie was right under the last rail.
Q. When you say "the last rail" which rail do you mean? Just step here and show us.

Mr. Leonard: Indicating the east rail of the middle track.

Q. And where was Gust Nanos then when you had one end of the tie against the east end rail?
A. He had hold of the tie.
Q. Where; which end?
A. The end towards the sidetrack.
Q. How far was he from the sidetrack?
A. About two feet.
Q. How long is a tie, was this tie?
A. About eight feet.
Q. And do you know how wide?
58 Mr. Bremner: Ten feet three inches from the outside of the rail to the outside of the rail.
Mr. Leonard: Do you measure from the top of the rail?
Mr. Beardsley: Yes.

Q. How wide is it between the main track that you were working on and the side track?
A. I do not know.
Q. Do you know whether it is wider than the length of the tie?
A. I think it is.
Q. Do you know about how much?
A. I do not know.
Q. Now after you had this tie out what did you do?
A. We had the tie out and the train was coming and we went to turn the tie and at that time Gust was struck.
Q. Which way were you going to turn the tie?
A. He says like this (indicating).
Q. When you had the tie pulled out indicate on this map just how the tie laid there on the track before you started turning it.

Mr. Leonard indicating straight across.

A. We got it straight across and then we went to turn it, the end towards the sidetrack away from town.
Q. Which end did you have hold of?
A. Towards the main line.
Q. And which end did Gust have hold of?
A. Towards the sidetrack.
Q. Which way were you facing?
59 A. I was looking at the tie.
Q. In what position were you? Let him indicate what position he was in when he was pulling the tie?
A. I was standing facing the tie.

Mr. Bremner: Give us what he said.
A. I was facing away from town.
Q. What did you do with the pick?
A. I was pulling to turn the tie.
Q. As you stood with reference to the freight train—as the freight train was going towards town were you pulling in the same direction as the freight train or was you pulling in the other direction, away from the way the freight train was going?
A. I was trying to turn it towards the town.
Q. Which way were you pulling, with reference to the way the train was going, was it in the same direction as the train was going or was it in the opposite direction?
A. The opposite direction.
Q. And which way was Gust Nanos pulling?
A. Gust was pulling one way and I was pulling the other way.
Q. What did Gust have in his hand when he was pulling?
A. A pick.
Q. And where was the pick at the time he was pulling?
A. Stuck in the tie.
Q. And where was your pick?
A. Stuck in the tie.
60 Q. Did you straighten out the tie before Gust was hurt?
A. No, sir.
Q. Did you move it at all, make any change in its position?
A. We didn't move it from where we left it.
Q. Ask him this: As you pulled out the tie you say it lay right across the track, between the tracks, but on a direct angle with the main track, and you say you were in the direction of the main track and was pulling the tie this way; how far had you pulled it when the accident happened?
A. We just had it turned a little when the engine struck Gust.
Q. Which engine struck Gust?
A. The switch engine.
Q. And which way was the switch engine coming?
A. From the yards.
Q. And was it in the same direction as the freight train was going or not?
A. No, sir.
Q. Going in the opposite direction?
A. Yes, sir.
Q. Had the engine of the freight train that was coming towards town passed when this accident occurred?
A. I do not remember exactly but I think it just had passed.
Q. Did you hear the switch engine coming?
A. No, sir.
Q. Did you see it coming?
61 A. No, sir.
Q. Did you hear it ring a bell?
A. No, sir.
Q. Did you hear it give any other signal?

A. No, sir.

Q. How did you know that Gust Nanos was struck by the engine?

A. I saw him struck, and then he came and struck me on the shoulder.

Q. Which shoulder did he strike?

A. My right shoulder.

Q. What part of his body struck your right shoulder, if you know?

A. My right side.

Q. Did you hear Gust say anything?

A. I just heard some "Oh" or something like that.

Q. Did you see the switch engine pass you?

A. Yes, sir.

Q. And did you see Gust Nanos?

A. Yes, sir.

Q. How far did it throw him or carry him?

A. About a rail.

Q. How many cars were there in the freight train, do you knew?

A. It may have been twenty cars or twenty-five I don't know he says.

Q. How many cars was there in this switch train, if you know?

A. About ten cars.

Q. How far did the switch engine go before it stopped after striking Gust?

62 A. About six or eight rails.

Q. How long is a rail?

A. Thirty feet.

Q. Did you see Nanos on the ground?

A. Yes, sir; I went and lifted him up.

Q. With reference to the sidetrack, to which track was his body closer, the sidetrack or the main track?

A. His feet were towards the sidetrack and his head was toward the main line.

Q. Did you see Gust at any time when the switch engine was carrying him when rolling him?

A. Yes, sir.

Q. How far on either side of the track does the engine project?

A. I do not know.

Q. Well, do you know approximately how much?

A. I don't know.

Q. Do you know if the engine is wider than the width of the track?

A. It is wider.

Q. About how much wider, indicate it with your hands, on either side of the track?

A. About that much (indicating).

Mr. Leonard indicating sixteen inches.

Q. With reference to the engine, where the engine of the switch train stopped, how many cars were between the place where Nanos lay after he was struck and the engine?

A. About three or four cars.

Q. Did this engine have a tender with it?

63 A. Yes, sir.

Q. And as it was pulling the switch train which way was the tender?

A. Back of the engine.

Q. Well, with reference to the train, was it in front of the train or between the cars and the engine?

A. It was behind.

Q. Behind what?

A. It was going backwards.

Q. In other words, the tender was in front of the train?

A. Yes, sir.

Q. And what did you do with Gust?

A. We took him and brought him to town.

Q. Do you know how long Gust was in this country?

A. About five months.

Q. How long had Gust worked for the Minneapolis and St. Louis road?

A. He was only about a month working.

Q. Was he a man of good health?

A. No, sir.

Q. Not after he was struck, but I mean before he was struck was he in good health or not?

A. Yes, he was.

Q. How much were you getting a day?

A. Oh, about $1.75.

Q. Do you know how much Gust Nanos was getting?

A. The same thing.

64 Cross-examination.

By Mr. Bremner:

Q. Mr. Barakos, let me see if I understand you now. You heard this freight train coming from the south?

A. Yes.

Q. You heard it whistle when it was three hundred feet away from you?

A. Yes, sir.

Q. And at that time you and Gust Nanos were engaged in pulling a tie out of the main track?

A. Yes, sir.

Q. And with that freight train approaching you still continued to pull on that tie until you had the west end of it under the east rail of the track?

A. Yes, sir.

Q. All the other boys got off the main track and went to the west?

A. Yes, sir.

Q. Gust Nanos had hold of the east end of this tie with his pick?

A. Yes.

Q. You had hold of the west end with your pick?
A. Yes, sir.
Q. And you were trying to pull the south end, or the end of the tie furthest from town, away further from town so as to bring it between the end of the two tracks?
A. Yes, we were trying to turn it.
Q. And trying to turn it so that the end nearest the sidetrack would be——
65 A. What is that?
Q. You were swinging it in that way so that the end next to the sidetrack would be moved further away from town, or moved to the south?
A. Towards the town.
Q. Which end towards train?
A. Of the last track.
Q. Now, I may have misunderstood you, but on your direct examination when you were first asked you testified that you tried to move the end next to the sidetrack away from town.
A. I had hold of one end and Gust had hold of the other and we were trying to turn it so as to prevent the train from striking.
Q. That tie was under the rails, wasn't it?
A. Yes, sir.
Q. The train couldn't strike it?
A. It wasn't under the rails at the time the train was there, it was outside.
Q. It was outside of the rails?
A. Yes, sir.
Q. And the train was running on the track, wasn't it, on the rails?
A. Yes; the tie was outside and when the train came we went to turn the tie and at that time the accident happened.
Q. You have just said, Mr. Barakos, that you were trying to turn the tie so that the train wouldn't hit it?
A. Yes, sir.
Q. Why, there couldn't be any danger of that train hitting it, could there?
66 A. I do not know.
Q. This tie laid between the rails of these two tracks, didn't it, the main track and the sidetrack?
A. Yes, sir.
Q. The train that was coming was coming on the main track so far as you knew?
A. Yes, sir.
Q. And you had simply dragged this tie right straight across and it still remained with its upper face below the level of the lower part of the rail, didn't it?
A. It was projecting.
Q. Projecting from what?
A. It was near the rail and projecting it.
Q. What do you mean by "projecting it"?
A. It would strike.

Q. Would strike what?
A. The tie.
Q. What would strike the tie?
A. We couldn't leave the tie there, we had the picks and we wanted to turn it.
Q. Do you mean to be understood as saying, Mr. Barakos, that the tie lying between the rails of these two tracks which you had just pulled out from underneath the rail might be struck by a train on this main line?
A. If it is too close it might strike it.
Q. It was entirely outside of the rails, was it not?
A. It was outside of the rail, but we had it laying on another tie and it was projecting.
Q. Projecting from what?
67 A. From the rail.
Q. It wasn't projecting over the rail into the track, was it?
A. No, sir.
Q. And in pulling this tie out, did I understand you to say that you pulled it up on top of another tie?
A. Yes, we did, because there were other old ties that we pulled out there and we had to pull it on the other side.
Q. But you had pulled it clear of the east rail?
A. Almost, yes.
Q. Well, was one end of it under the rail while you were trying to turn it?
A. It was out, the tie.
Q. Which way were you trying to turn that tie?
A. It was laying this way he says and he wanted to turn it this way (indicating).
Q. That doesn't mean very much to us here. You were trying to pull your end to the north, were you not?
A. Toward the freight train; I was pulling my end toward the freight train.
Q. How close to the main line, how close were you standing?
A. I was pretty close.
Q. And you stood there with this freight train coming down with your back towards the freight train pulling on this tie, were you?
A. Yes, I had the pick in the tie and I was pulling.
Q. And you had your back to the freight train?
68 A. Yes, sir.
Q. Was there anything to prevent your seeing towards the south?
A. I was doing my work.
Q. Was there anything to prevent you from seeing towards the south?
A. No, sir.
Q. You heard this freight train coming?
A. Yes, sir.
Q. You heard the bell ringing on the freight train?
A. I heard the noise more than I did the bell.
Q. You heard the bell though?

A. Yes, I did at last.

Q. And you think that the engine of the freight train had just gone by you when Gust was struck?

A. They just about came at the same time.

Q. This whole gang was working right close together, was it not?

A. Yes, sir; all together.

Q. And were you at the north end of the gang or in the center of the gang, or where were you in respect to the other members of the gang?

A. We were in the front toward the city.

Q. And all the rest of the gang except you and Gust got off on the west side?

A. Yes, sir.

Q. Now, I am going to ask you if you will, just take this pointer, I will lay this plat down here on the floor so as to represent the tracks and have you explain to the jury just exactly what you were doing just before Gust was struck. Here is a match which
69 you can use for a tie.

A. That is the way the tie was laid when Gust had hold of this end and I had hold of the middle, and we had to change our picks before we could pull it entirely out, and then we got the tie there between the two tracks, Gust turned his end towards the town and I turned my end towards far from town.

Q. Did Gust change the position of his pick after the tie had been pulled or started out from under the rails?

A. Yes; he had his pick in the tie and then he struck it again and turned.

Q. Where was Gust standing as he was pulling on that tie?

A. He was standing at that end and I was standing at the other.

Q. Where with reference to the track?

Mr. Leonard: Let the record show what end he indicates. I want the record to show just where the witness indicated just where Nanos stood with reference to that tie. The witness indicated that Gust Nanos stood on the side of the tie, on the east end of the tie——

Mr. Bremner: Just let the witness tell it.

The Court: Let him indicate from now on.

Mr. Leonard: I want the record to show that I am asking now that the record show that the witness indicated that Gust Nanos stood at the east end of the tie pulling towards town.

Mr. Bremner: I want to say to the court for the sake of the record that so far as I noticed the witness didn't indicate he was
70 standing on the east end of the tie pulling towards town; he didn't say a word about the pulling or anything of the kind.

Q. Now, will you just go ahead from the point where you were interrupted and tell us what happened. You had Mr. Nanos at the west end of the tie; now, whereabouts was Mr. Nanos with reference to the sidetrack?

Mr. Leonard: That is objected to as assuming a state of testimony that the witness didn't testify to.

The Court: Objection sustained.

Q. Well, possibly I am incorrect in that. You have testified that Mr. Nanos was pulling on the west end of the tie?

Mr. Leonard: I object to this statement inasmuch as the witness hasn't so testified; he has testified to the contrary.

The Court: Objection sustained.

Q. I mean east end; I am mistaken. You testified that Mr. Nanos was pulling on the east end of this tie; now where did Mr. Nanos stand with reference to the sidetrack?

A. He had his pick on the tie and he was pulling the east end of the tie while I had my pick on the west end of the same tie where I was pulling.

Q. I have asked you where Mr. Nanos stood with reference to the switch track?

A. He says we had the tie this way and he was pulling and I was pulling.

Q. You don't answer my question yet.

71 A. He was standing between the tracks.

Q. Was he standing between the tracks?

A. He was standing between the tracks.

Q. Will you lay that match between the tracks in just the position it was when Mr. Nanos was struck?

A. I can't fix it, it is too narrow there.

Q. Well, use this. Now, does the position of the match as you have laid it upon the plat indicate the position of the tie with reference to the tracks at the time Mr. Nanos was struck?

A. The tie had been turned a little.

Q. The tie had been turned a little diagonally across the space between the tracks—is that correct?

A. Yes, sir.

Q. And the east end of the tie had been pulled away from the lead track or switch track?

A. No, it wasn't exactly.

Q. Not exactly what?

A. It wasn't up against the sidetrack at all.

Q. Put that back in the position you had it, representing the position it was in when Nanos was struck. The match as it no rests upon the track represents the position the tie was in when Mr. Nanos was struck?

A. It was about that way.

By Interpreter: An angle of about 45 degrees.

By Mr. Leonard:

Q. Will you indicate the exact position on this map with this match of the tie as it laid there when Nanos was struck, show-

72 ing how far you had pulled it? Is this the position that the tie was in at the time that Nanos was struck?

A. That is the position.

Mr. Leonard: All right; marked in blue pencil A. B.

Q. You were asked a question as to whether there was anything

to prevent you from seeing south. Do you know which side is south and which side is north on this map?

No answer.

Mr. Bremner, continuing:

Q. Was there anything, Mr. Barakos, to prevent your seeing towards the north, seeing up the track towards town?
A. No, sir; there wasn't anything.

Redirect examination.

By Mr. Leonard:

Q. Well, did you look up north at the time you were pulling this tie?
A. No, sir.
Q. Why not?
A. Because I was working.
Q. What order had you got from your foreman with reference to moving ties or leaving ties between tracks?

Mr. Bremner: That is objected to an incompetent, irrelevant and immaterial.

Q. Well, whom did you work under?
A. Mr. Miller.
Q. Was there any order, any rule or order about picking out these ties and leaving them between the tracks?

73 Mr. Bremner: That is objected to as incompetent, irrelevant and immaterial.
The Court: Objection sustained.

Q. If this tie had been left in the position as it was after you pulled it from under the rails as it lay there before turning it would a passing freight be apt to hit it.

Mr. Bremner: That is objected to as incompetent, irrelevant, immaterial and calling for a conclusion of the witness.
The Court: Well, if he knows whether or not it is possible for a freight train to hit that tie he may answer it:

Question read by the reporter.

A. Yes if we would leave it there the oil boxes would strike it.
Q. And did you not think so at the time?

Mr. Bremner: That is objected to as immaterial and calling for a conclusion.
The Court: Objection sustained.

Recross-examination.

By Mr. Bremner:

Q. Mr. Barakos after you pulled this tie out of the main line did you raise the end towards the main track?
A. I didn't lift it but I turned it.

Q. The ground between the main track and the sidetrack at the place where you were working is level with the tops of the ties is it not?

A. Some ties stand higher than the ground and some are even.

Q. The ground between the tracks however is level with
74 the surface of the ground or the ballast in between the rails is it not?

A. In the main line it may be a little different.

Q. The main line is a little higher than the ground in between?

A. Yes, sir.

Q. So that the ground east of the main line and between the main line and the sidetrack is about level with the bottom of the ties in the main track?

A. In some places the tie is about an inch or two inches in the ground, and in some of the places it is different.

Q. I am referring to this particular place where you were working at the time the accident occurred.

A. It was about an inch above the ground; the tie was standing higher than about an inch or two above the ground.

Q. Do you mean that the tie was embedded in the ground about an inch or two, or that the top of the tie was an inch or two on the surface of the ground between the tracks?

A. It was higher than the ground, between them.

Q. The tie was?

A. Yes.

Q. In order to get this tie out of the main track you had to dig a trench in the ground between the two tracks, did you not, that is between the main track and the sidetrack?

A. Yes, sir.

Q. And you pulled this tie out into this trench?

75 A. Yes, sir.

Q. What are these oil boxes you are talking about on the train?

A. It is the oil boxes where they put the dope in.

Q. You mean then the oil boxes on the wheels, on the axles?

A. Yes, on the axles.

Q. Now, those boxes, those oil boxes, set above or around the axle of the wheel, do they not?

A. He says it is in the middle.

Q. Yes, in the middle of the wheel?

A. Yes.

Q. And the bottom of it is several inches above the rail?

A. Some of them are high but some are low.

Q. They all set on the center of the wheel, don't they?

A. Yes, sir.

Q. And they only project outside of the wheel about two inches, don't they?

A. I don't know how much they project.

Q. Well, it is a very small distance, isn't it?

A. Not very much.

Redirect examination.

By Mr. Leonard:

Q. Mr. Barakos, you say that when you pull out these ties you dig a trench. Do you dig a trench between the main track and the sidetrack when you pull out a tie, or how much do you dig?

A. Between the two tracks.

Q. All the distance betwen the two tracks—I don't refer
76 to the rails but to the two tracks—do you dig a trench all the distance between the two tracks?

A. There are some ties where we have to dig a little to get them out and some others we have to dig a trench.

Q. Well, do you dig a trench all the distance between one rail and the other between the tracks?

A. Yes, if there is any longer tie we have to do it.

Q. These ordinary ties in that main track did you have to dig trenches—did you for this tie that you had just pulled out, did you dig a trench all the way?

A. About half ways.

Q. And what did you do with the dirt that you took out from the trench?

A. We threw it on the side.

Q. Which side?

A. I don't remember, but one side.

Q. How deep a trench was that?

A. About four inches.

Q. About four inches?

A. Yes.

Q. Then as you pulled out the tie, was any part of that tie over this gravel or dirt that you had just pulled out?

A. Yes, sir.

Q. About how much above the ground, if you remember, did this gravel and dirt that you pulled from under it, from the trench which was dug, how high was it above the ground?

77 A. We had a pile between the track and we had a pile on the outside, but I don't know exactly.

Recross-examination.

By Mr. Bremner:

Q. Now, Mr. Barakos, in taking these ties from under the track you dig a trench, depending somewhat on the size of the tie, about half way or three-fourths of the way across, sloping that trench to nothing?

A. Yes, sir.

Q. And then you pull the tie right straight out in that trench, don't you?

A. Yes, sir.

Q. And right next to the main track in this particular instance your trench, of course, extended to the bottom of the tie?

A. Yes, sir.

Q. And you couldn't begin to turn that tie until the end of it was out nearly to the ends of the other ties?
A. We couldn't turn it on account of other old ties that were taken out being there.
Q. And the end next to the main track set down in this trench between the other ties, didn't it?
A. I had it lifted to turn it.
Q. You lifted it on the tops of the other ties?
A. Yes, sir.
Q. What is the depth of a tie, do you know, the thickness?
A. I don't know.
Q. About six inches?
A. About six or seven inches; he don't know.
78 Q. This tie when you commenced to turn it, you don't lift it up on this dirt that you had taken out of the trench at all, do you, you just swing it out against that dirt?
A. If there is any other place we don't put it on the pile there but we put it some place else.
Q. In this particular instance now that we are talking about?
A. In this instance it was on another tie.
Q. After you turned it?
A. When I turned it a little.
Q. After you had turned it over towards the lead track the end was on another tie?
A. Yes, sir.

(Short recess.)

JAMES EFTHIMIOU, after being first duly sworn, testified as follows:

Emanuel S. Johanides, interpreter.

Examined by Mr. Leonard:

Q. How old are you?
A. Thirty-six years old.
Q. Your full name is what?
A. James Efthimiou.
Q. James Efthimiou?
A. Yes.
Q. Where were you born?
A. At Sesklo.
Q. That is in Greece?
A. Yes.
Q. Did you know Gust Nanos before his death?
A. Yes, sir.
79 Q. Did you know him in the old country?
A. Yes, sir.
Q. How long have you been in this country?
A. Four years.
Q. What is your work?
A. I am engaged in the shoe shining business now.

Q. In this city?
A. In Minneapolis, yes.
Q. How long have you been in that business?
A. About six or seven months.
Q. And before that what did you do?
A. I was working for the Minneapolis and St. Louis Railroad Company.
Q. How long did you work for the Minneapolis and St. Louis Railroad?
A. About two years and a half or three.
Q. Did you work for the Minneapolis and St. Louis railroad on the 22nd day of May, 1912, when Gust Nanos was killed?
A. Yes, sir.
Q. What yards?
A. Kenwood yards.
Q. How long had you worked for the company before that day of the accident?
A. About a year and a half or two.
Q. And have you worked for the Minneapolis and St. Louis Railroad Company since that accident?
A. I left there and went into business for myself.
Q. And up to the time that you went into business did you
80 work for the Minneapolis and St. Louis Railroad Company?
A. Yes, sir.
Q. And where, what yards?
A. At Kenwood yards.
Q. Doing what?
A. We were changing ties and so on.
Q. Doing track work?
A. Yes.
Q. On the 22nd day of May, on the day of this accident, what work were you doing?
A. We were putting in ties.
Q. Putting in what kind of ties, new or old?
A. We were pulling out the old ones and putting in the new ones.
Q. Who was your partner?
A. James Andrews.
Q. Who else worked in that gang on that day?
A. We were ten men but two had gone with the foreman a little ways further from there, but we were eight.
Q. Do you know the names?
A. Yes, sir; I know the names.
Q. All right, give me the names.
A. John Barakos.
Q. Was he a relation of Christ Barakos?
A. He is over in the old country.
Q. Who else worked there.
A. Gust Kachanis.
Q. Who else worked there?
A. Christ Nanous.

Q. Who else was working there?
81 A. Apostolus Nanous.
Q. And who else worked there?
A. Do you want the names of all the train men or just the eight?
Q. Just the eight.
A. How many have you got now?
Q. Four.
A. Christ Barakos, Jim Angelo.
Q. And yourself?
A. Yes, and the one that was killed.
Q. Gust Nanos?
A. Yes; does that make eight?
Q. Which one was water boy?
A. Christ Nanous.
Q. Witness, step down here. These are the three tracks; here is the switch stand; there is the sidetrack; this is the main track on which trains go to town, and this is the track on which trains go out of town.
A. This is the sidetrack?
Q. Yes, this here. Do you want this map reversed?
A. He says the way the tracks lay, there is the sidetrack, here is the main line, and here is the other main line.
Q. We will reverse that so he will understand it. Is that better?
A. Yes.
Q. This is the switch stand?
A. Yes.
Mr. Bremner: What did he say?
A. He said when the map was that way that is exactly
82 right; that is the sidetrack and this is the main iine and this is the other main line.
Q. What time of the day was it that Gust Nanos was killed?
A. About 2:30 or 2 o'clock.
Q. In the afternoon?
A. In the afternoon.
Q. Was it a bright day or not?
A. It was a bright day.
Q. With reference to the switch stand—strike that out.
Q. Which track were you working on?
A. The middle track.
Q. With reference to the switch track, how far from the switch stand were you when this accident occ-rred?
A. About two rails.
Q. And when you say two rails, do you mean away from town?
A. Away from town.
Q. And where was Gust Nanos working, on which track?
A. On the same track.
Q. And how far away from you?
A. About one rail from me.
Q. When you say one rail, do you mean away from town or towards town?
A. I was towards town.

Q. I will ask you while you were working for the Minneapolis and St. Louis railroad if you know of any custom of giving signals by passing engines to men on tracks who were there at work?

83 Mr. Bremner: That is objected to as incompetent, irrelevant, immaterial and the witness isn't qualified to answer.

The Court: Objection overruled.

Mr. Bremner: Exception.

A. Yes, they ring the bell.

Q. Who rings the bell?

A. The engineer.

Q. Did you pull out any ties that afternoon?

A. Yes, sir.

Q. And which side of the middle track did you pull your ties, towards the sidetrack or towards the other track?

A. Towards the sidetrack.

Q. What particular work did you do in connection with pulling out ties?

A. We had to dig the ground and make the trench big enough to pull the tie out, and then to put spikes under the other ties in order to bring the track level, and after we got the spikes out we left the tie where it was.

Q. What did you do at the time of this accident?

A. I was pulling those extra spikes.

Q. Which rail?

A. Both rails.

Q. Did you see a freight engine coming towards town?

A. We saw the train coming towards town and my partner he leveled the gravel down and I pulled the spikes from under the rails.

Q. Did you hear the freight train coming towards town

84 give any signal?

A. The bell was ringing.

Q. What other signals did you hear?

A. I don't remember of any other signal.

Q. Before it approached you did you hear any signal at any crossing?

A. I saw the train.

Q. How far was the freight train when you first saw it?

A. About twenty or twenty-five rails further.

Q. And what attracted your attention to the freight train when you first saw it? I will change that. What made you look towards the freight train?

A. I was always on the lookout.

Q. As the freight train approached what did you do?

A. I heard it and pulled the spikes out.

Q. What did you do?

A. When I pulled the spikes the train went by.

Q. Which side of the track did you go?

A. Back, this way.

Q. When you say "back, this way," do you mean that you went towards the sidetrack or towards the other track?

A. Towards the other main line.

Q. Which rail were you working on just before the freight engine passed you, indicate on the map?

Interpreter: He indicates the rail towards the sidetrack or the lead track.

Q. And how far was the freight train just as you stepped out of the track?

85 A. About a half a rail. I wanted to clear the way and that is why I stayed so long in there.

Q. Did you see Nanos at the time he was struck?

A. When I jumped on the other side the engine struck Gust Nanos.

Q. What engine struck Gust Nanos?

A. The engine on the sidetrack.

Q. And which way was that engine going, away from town or towards town?

A. It was going away from town.

Q. What happened to Gust Nanos—strike that out.

Q. Did you hear the switch engine on the sidetrack ring the bell or give any other signal?

A. No, sir.

Q. And could you see Gust Nanos after he was struck?

A. He says when I pulled the spikes and jumped on the other side the freight train got between us.

Q. And could you see Nanos at all while the freight train was passing you?

A. They both came at the same time.

Q. Could you see Gust Nanos while the freight train was passing you?

A. I saw him, I saw Gust Nanos when he was under the cars of the freight train.

Q. Do you mean to say you saw him under the cars of the freight train?

A. He says we saw the other engine coming and we thought
86 it would strike, and that is why I was watching from under the cars and that is why I saw him.

Q. Watching from under the cars of the freight train?

A. It struck him, and then I looked under the cars as the freight train was passing and I saw him.

Q. Did you go to him after the freight train passed?

A. Yes, we went on the other side and we took him and put him on the engine and brought him into town.

Q. How far was the engine of the switch train beyond the place where Gust Nanos laid?

A. Five or six rails.

Q. And was Gust Nanos' body lying closer to the sidetrack or closer to the middle track?

A. His partner had hold of him at the time and I saw that he was laying between the two tracks.

Q. Between the main track and the sidetrack?

A. Yes, sir.

Cross-examination.

By Mr. Bremner:

Q. You were working about a rail length or thirty feet nearer the switch than Mr. Nanos, were you?

A. Yes, sir.

Q. What was Gust Nanos doing just before he was struck?

A. They had pulled out a tie.

Q. What was Gust Nanos doing just before he was struck?

87 A. He was pulling a tie.

Q. Were you watching him pull the tie?

A. I wasn't standing and looking at him, but I was pulling a spike and I just happened to glance at him.

Q. How long before you got off the track did you see him last?

A. Not a second.

Q. What is that?

A. Not quite a second.

Q. Why did you get off of the track on the side towards the other main line when you were working on the side near the sidetrack?

A. Because I had pulled the spike and my body was more to the other rail.

Q. You heard the bell on the freight train?

A. Yes, sir.

Q. And you heard the noise made by the freight train on the main line?

A. Yes, sir; we saw it too, we saw the train, too.

Q. And you were watching and paying close attention to that freight train, weren't you?

A. Yes, sir.

Q. You wanted to be sure and get off the track yourself before that freight train got to you?

A. Yes, I was trying to clear the way and get out.

Q. But your attention was directed towards the pulling of the spikes and to clear the way on the main track?

A. Yes, sir.

88 Q. I confess I don't understand just what you mean about these extra spikes; I wish you would explain.

A. We pull the old spikes from the old ties and then we loosen up the spikes that stay under the track, and we raise the rail a little and put the spikes under a little so as to make it a little higher.

Q. So in pulling the spikes as you call them of the east rail of this main track you were facing the sidetrack?

A. Yes, sir.

Q. And this switch engine had to pass you before it reached Gust Nanos, didn't it?

A. I didn't see the switch engine until the time I went to jump out, and then I saw it strike Gust.

Q. You were looking toward the lead track or the side track and yet this engine had to pass you before it struck Gust Nanos, and yet you didn't see it before it struck Gust?

A. I didn't have my attention towards him, I had my attention

towards the train that was coming. When we work on the main line we always look out for a freight train on that line there.

Redirect examination.

By Mr. Leonard:

Q. When you jumped did you jump backward or did you jump frontways?

A. I turned around and my face was ahead.

Q. But before you turned around, as you were pulling out these spikes, were you facing towards the switch track or away from the switch track?

A. My face was toward my work.

Q. But was your work ahead of you and towards the switch
89 track or towards the other track?

A. I didn't look toward the sidetrack at all, I was looking toward the main line.

Q. Then you say as you jumped out you turned around, and as you turned around did you face the switch track?

A. Then my face was turned toward the main line.

Q. When was it you saw Gust Nanos, was it before you turned around or after you turned around?

A. At the time I was turning.

Recross-examination.

By Mr. Bremner:

Q. As you were working on the east rail of the main track your back was towards the west or the other main track, wasn't it?

A. I was working on the main line.

Q. But your back was towards the west?

A. After I jumped I turned around and I looked at the sidetrack.

Q. Now we will go back over that again. You were pulling spikes out of the east rail of the center track, weren't you?

A. Yes, sir.

Q. And your back was towards the west rail of that track, wasn't it?

A. Yes, sir.

Redirect examination.

By Mr. Leonard:

Q. As you were pulling out the spikes from the east rail were you standing inside of the rail or outside of the rail, out-
90 side of the track or inside of the track?

A. I was pulling the spikes from both rails.

Q. But just after this accident—tell him to pay attention to your particular question.

A. What is the question?

Q. There are spikes in the ties on either side of the rail, on both

sides; in other words, the rail is held to the tie on both sides of the track, outside of the track and inside of the track. Were you pulling out extra spikes?

A. Yes.

Q. And when you were pulling out the extra spikes were you inside between the rails or not?

A. I was between the two rails.

Mr. Leonard: We offer the American tables of mortality.

Mr. Bremner: Defendant will admit that the American table of mortality shows that the expectancy of life for a male 38 years of age is 29 and 96/100ths years, but objects to the offer as incompetent, irrelevant and immaterial, such tables not being competent evidence of the probable life of any particular individual.

The Court: Objection overruled.

Mr. Bremner: Exception.

Mr. Leonard: Plaintiff rests.

Mr. Bremner: The defendant now moves the court to dismiss this action on the following grounds, to-wit: Upon the whole case thus far made the plaintiff is not entitled to recover. That plain-
91 tiff has failed to show that the defendant or any of its employes was guilty of any negligence which caused or contributed to the accident which resulted in the death of the plaintiff's intestate. Third: That the undisputed evidence shows that the plaintiff's intestate was himself guilty of negligence, which was the proximate cause of the accident which resulted in his death. Fourth: That under the pleadings in this case the plaintiff is not entitled. Fifth: That the reply admits that a settlement was made between John F. Bernhagen, special administrator of the estate of Gust Nanos, deceased; that is to say, that the defendant and John F. Bernhagen, as special administrator of said estate, did settle all claims of the estate of Gust Nanos against the defendant for and on account of the claim of the wrongful killing of the plaintiff's intestate in the sum of seven hundred dollars. No evidence has been offered tending to impeach or in any way nullify that admitted settlement. Sixth: For the reason that there is a fatal variance between the proof in this case and the cause of action alleged in the complaint. Seventh: For the reasons stated in the motion to dismiss heretofore made, to-wit: that this action is brought under the terms of the statute of the United States, known as the "Federal Employers' Liability Act," and it appears that the sole beneficiaries of the action are non-resident aliens, and that non-resident aliens are not entitled to recover under the provisions of said law. Eighth: That
92 no proof has been offered tending to show any financial loss to the persons for whose benefit this action is brought; that is to say, no proof has been offered that the plaintiff's intestate contributed to the support or had been contributing to the support of those for whose benefit this action is brought prior to his death.

Court adjourned.

Pursuant to adjournment the court convened at 10 A. M. April 30th, 1914.

The Court: The motion to dismiss will be denied.
Mr. Bremner: Exception.
Mr. Leonard: I would like to reopen the case for the purpose of putting another witness on the stand, to show the exact date when the deceased arrived, the witness coming with the deceased and left the old country, and also the ages and names of the children.
The Court: You may do that.

CHRIST NANOS after being first duly sworn, testified as follows:

Emanuel S. Johanides, interpreter.

Examined by Mr. Leonard:

Q. Your full name is Christ Nanos?
A. Yes, sir.
Q. How old are you?
A. About nineteen years old.
Q. How long have you been in this country?
A. Two years.
Q. When did you come to this country?
A. In April.
Q. How long ago?
93 A. Eight days over two years.
Q. It is eight days and two years that you are in this country?
A. Yes.
Q. What steamer did you come on?
A. On the steamer Calabria.
Q. And where did you land?
A. At New York. I stayed for eight days in Ellis Island, Castle Garden.
Q. What are you doing in Minneapolis; what is your work?
A. I am working at the Radisson Hotel.
Q. And where did you live in the old country?
A. At Sesklo.
Q. Did you know Constantine Nanos, the deceased, Gust Nanos?
A. Yes.
Q. What relation was he to you?
A. He is my uncle.
Q. You are a brother of Alex Nanous who was here on the stand?
A. Yes, sir.
Q. How long did you live in Sesklo?
A. Sixteen or seventeen years.
Q. You were born in Sesklo?
A. Yes, sir.
Q. Did you know your uncle in Sesklo?
A. Yes, sir.
Q. Where did he live?

A. It was a big house divided in two, we used to live in one department and he used to live in the other.

94 Q. Who owned the house?

A. Half of it belonged to my father and the other half to my uncle.

Q. Was your father and the deceased brothers?

A. Yes, sir.

Q. And did your uncle live with his family?

A. Yes.

Q. About how old a man was your uncle?

A. About thirty-eight years old.

Q. And how old was his wife, if you know?

A. She was five years younger than my uncle.

Q. When you say she was five years younger than your uncle was it at the time he died? When you say she was thirty-three you mean at the time—strike that out.

Q. How many children did your uncle have when you left?

A. He had two daughters and one boy.

Q. Do you know the names of his children?

A. Yes, sir.

Q. Give the names of his children.

A. One is Katherine.

Q. How old is she?

A. About eight years.

Q. I mean now. How old is she now?

A. About ten or eleven.

Q. And what is the next one?

A. Five years old.

Q. What is the name?

A. Stavroula.

95 Q. Is she five years now or was she five years when you left?

A. She was five years when I left there.

Q. What is the boy's name?

A. Argerios.

Q. How old is he?

A. It was one year old.

Q. What was your uncle doing; what was his business or occupation?

A. He was working on a farm.

Q. Do you know if he had a farm?

A. Yes, sir.

Q. How big a farm?

A. He had about two hundred and fifty stremata.

Mr. Leonard, asking Interpreter:

Q. How big is a stretmata?

A. One thousand square meters.

Q. With reference to an acre?

A. About four stremata would make one acre.

Mr. Leonard, continuing:

Q. Where did he have his farm?
A. Right outside of the village.
Q. What did he have on his farm; what did he raise on his farm?

Mr. Bremner: That is objected to as incompetent, irrelevant and immaterial.
The Court: Objection overruled.
Mr. Bremner: Exception.

A. I know he used to raise wheat and barley.
Q. And what else?
A. Oats; tobacco.
Q. Did he raise any fruit?
A. He had a garden and he used to get pears and apples.
96 Q. Do you know if he had anything else on this farm?
A. He had some grape vines.
Q. Where did he have the grape vines?
A. About ten minutes' walk from the village.
Q. Was that on the farm?
A. Yes, on the same farm but they were at the end of the farm.
Q. Do you know who supported his wife and his children?
A. Himself.
Q. Do you know who furnished them groceries and clothes?
A. He himself; he used to buy whatever was necessary for the house.
Q. And as far as you know he lived with his family, did he, all the time or not?
A. Yes, sir.
Q. Do you know when he left?
A. The first of March according to the Greek calendar.
Mr. Bremner: What year?
A. 1912.
Q. And you say first of March according to the Greek calendar; according to our calendar do you know?
Interpreter: The 14th of March.
Q. Did he leave at the same time that you left?
A. Yes, sir.
Q. And did you come on the same boat with him?
97 A. Yes, sir.
Q. And after you arrived at Minneapolis did you go to work for the same railroad company?
A. Yes, sir; eight days after we arrived from New York.
Q. You mean eight days after you arrived from New York?
A. He came ahead of me to Minneapolis.
Q. By "he" you mean your uncle?
A. Yes.
Q. And did you see his wife and children at the time he left?
A. Yes. His children and his wife were all together there and they kissed good bye.
Q. Did you see him bid good bye to his wife?
A. Yes; I saw her crying, too.

Q. Where did he leave her?
A. He left her at her house.
Q. And then from Sesklo you went to Athens I suppose?
A. No, sir; we went to Volos.
Q. And from Volos you went where?

Mr. Bremner: That is objected to.

Q. Well, you say you went to work for the Minneapolis and St. Louis railroad when you came here?
A. Yes.
Q. Did you work in the same gang with your uncle?
A. Yes, I was there the water boy.
Q. When did you get paid by the Minneapolis and St. Louis railroad, how many times a month?
98 A. Once a month.
Q. What date in the month?
A. On the 15th.
Q. On the 15th of the month?
A. Yes.
Q. And when you are paid on the 15th of the month aren't you paid for the previous month?
A. No, they hold back some.
Q. They hold back two weeks, don't they?
A. Yes, sir; they hold back fifteen days.

Cross-examination.

By Mr. Bremner:

Q. Did I understand you to say that your uncle and your father owned a house or lived in the house together?
A. Yes, sir; they lived in the same house but it was divided in two.
Q. It was a double house?
A. Yes.
Q. This house was on this farm that you speak of?
A. It was in the village.
Q. And your uncle owned these sixty acres, did he?
A. Yes, sir.

Redirect examination.

By Mr. Leonard:

Q. Do you know whether your uncle was in good health or not before he was killed?
A. Yes, sir.
Q. Do you know his habits, whether he was a drinking man or not?
99 A. No, sir; he wasn't a drinking man.
Q. Do you know whether your uncle worked? Do you know how long your uncle worked before he left Sesklo, how long he continued to work before his departure?

Mr. Bremner: I don't see how this young man can answer that question.

Q. Just immediately before, months or weeks or days?
A. He was working every day.
Q. And did he have any other business than farming, if you know?
A. No, sir.
Q. Did he have any other income than from the farm?
A. Yes, sir. He had a share where he used to get five hundred dra-hms every year.
Q. A share of what?

Mr. Bremner: That is objected to as incompetent, irrelevant and immaterial.

Mr. Leonard: Well, that is all.

Mr. Leonard: We offer the American table of mortality of a female at 33. We offer to prove that a female of that age has an expectancy of 33 years.

Mr. Bremner: Defendant admits that the American table shows expectancy of life of a female of 33 years of age to be 33 and 6/100ths years, but we object to the offer as incompetent, irrelevant and immaterial, the tables not being competent evidence of the expectancy of life of any particular individuals; and for the further reason that the expectancy of life of a female 33 years of age
100 is immaterial; and for the further reason that the American tables are not competent evidence as to the expectancy of life of a person living in Greece.

Mr. Leonard: We offer then also the Northampton tables——

Mr. Bremner: Wait a minute. I will withdraw the objection to the American tables to save time.

The Court: Received.

JAMES EFTHIMIOU, recalled.

Emanuel S. Johanides, interpreter.

Examined by Mr. Leonard:

Mr. Bremner: Our section foreman states that there has been no change in the track at this point so we will admit there has been no change.

J. A. MCLEOUD, after being first duly sworn, testified as follows:

Examined by Mr. Leonard:

Q. What is your business?
A. Engineering business.
Q. With whom?
A. J. E. Egan and Company.
Q. They are surveyors here in the city?
A. Yes, sir.
Q. Offices in the Oneida block?
A. Yes, sir.

Q. Were you requested to measure the distance of the tracks in the Kenwood yards south of the switch over the lagoon?

A. Yes.

101 Q. Who asked you?

A. Mr. Leonard, the attorney.

Q. Myself?

A. Yes.

Q. When was it I asked you?

A. This morning.

Q. Did you go out to measure it?

A. I did.

Q. When did you measure it?

A. I just returned.

Q. How far from the switch did you measure it?

A. Four or five rail lengths I would say.

Q. Are the tracks parallel or not?

A. They are parallel to the eye.

Q. How many tracks did you measure?

A. I measured the distance between the tracks, the three tracks.

Q. Did you measure the distance between the sidetrack and the middle track?

A. Yes.

Q. What is the distance?

Mr. Bremner: That is objected to as incompetent, irrelevant and immaterial.

The Court: Objection overruled.

A. Ten and two-tenths feet.

The Court: What is that?

A. Ten and two-tenths feet.

Q. Ten and two-tenths feet?

A. Yes. sir.

Q. What is the distance between the main track and the middle track?

102 A. Nine and 94/100ths.

Q. What is the width of the tracks?

A. The tracks are four and 72/100ths.

Cross-examination.

By Mr. Bremner:

Q. You say that the sidetrack and the main tracks are ten and two-tenths feet apart; that would be ten feet and one-fifth?

A. Yes, practically.

Q. You say it is nine feet and what between the main track and the middle track?

A. Nine feet and over—94/100ths.

Q. You measured from the outside of the rail to the outside of the rail?

A. Yes.

Q. Those tracks are constructed on what is known as fifteen foot centers, aren't they?
A. Yes, sir; supposed to be.
Q. Supposed to be fifteen foot centers?
A. Yes.

Mr. Leonard: Plaintiff now rests.

Mr. Bremner: Defendant now renews the motion made when the plaintiff previously rested, on all the grounds set forth in the motion.
The Court: The motion will be denied.
Mr. Bremner: Exception.

Short recess.

Mr. Leonard: I want the record to show that counsel in his opening statement to the jury has just stated, "I want my kind Christian Jewish friend to know that I have conducted this department
103 and know what I am saying," or words to that effect, "that it has been our custom to contribute two hundred dollars in case of death whether there is any liability or not."
The Court: Proceed. The jury will pay no attention to the remark.

GERALD S. KIBBEY, after being first duly sworn, testified as follows:

Examined by Mr. Bremner:

Q. Mr. Kibbey, you reside in Minneapolis?
A. I do, sir.
Q. And employed by the Minneapolis and St. Louis Railroad Company?
A. Yes.
Q. In what capacity?
A. Assistant engineer.
Q. How long have you been employed in your profession?
A. About eight years.
Q. How long have you been employed by the Minneapolis and St. Louis——

Mr. Bremner, continuing:

Q. Mr. Kibbey, in 1912 you made a survey in this particular portion of the yard south of the canal bridge, did you not, at our request?
A. Yes.
Q. And as a result of that investigation you prepared a plat to scale?
A. Yes, sir.
Q. That plat to which you refer is the one just handed you, marked defendant's Exhibit 2?
A. Yes, sir.

104 Q. Now, Mr. Kibbey, what is the scale of that plat?
A. This plat represents one inch equals twenty feet.
Q. Does that plat truly and correctly represent the position of the tracks shown thereon, switches and so on at the time you made your survey?
A. It does, yes, sir.
Q. When did you make your survey?
A. October 12th, 1912; I have the date on here, 8-12-1912.
Q. That would be August 12th, wouldn't it?
A. Yes; August 12th, 1912.
Q. Now, has there been an- changes—strike that out.
Q. You are familiar with the yards and tracks in this vicinity?
A. Yes.
Q. How long have you been familiar with them?
A. Oh, for the last four years.
Q. Had there been an- change in those tracks between May 22nd, 1912, and the date you made your survey, August 12th, 1912?
A. I don't think there was; I don't think so.
Q. You say there hadn't been any change?
A. No, sir; not that I know of.

Mr. Bremner: Defendant's Exhibit 2 offered in evidence.
The Court: Received.

Q. Mr. Kibbey, you took the measurement of the distances of what we have referred to between the switch track and the
105 east track and the northbound main, did you?
A. Yes.
Q. Give us the distances as you took them south of the switch?
A. We measured them from track center to track center. As we measured those distances we measured from track center to track center, and the track centers are uniform through there, they are 15 and 3/10ths feet starting at the south head block and going south; that would correspond to 15 feet and three and a half inches practically.
Q. What is the width of the track?
A. Four feet and 7/10ths.
Q. Four feet, 8½ inches, isn't it?
A. Yes.
Q. Tell us what distance that would give us between the outside face of the ball of the rail of the two tracks?
A. That was ten feet and 2/10ths.
Q. It would be ten feet, two and a half inches?
A. Yes.
Q. What is the length of a tie, Mr. Kibbey?
A. Eight feet.

Cross-examination.

By Mr. Leonard:

Q. Did you measure any of those ties?
A. Not right in there I haven't, no.

Q. What is the standard gauge?
A. Eight feet.
Q. How long are they?
A. Six by eight; six inches by eight inches by eight feet.
106 Q. What wood are they of?
A. Cedar and hemlock, pine maybe, different kinds of wood.

Redirect examination.

By Mr. Bremner:

Q. This particular track is straight?
A. The lead, yes, that is straight.
Q. Do you know what the kind of ties were in there?
A. No, I couldn't say.

CLAUS R. MILLER, after being first duly sworn, testified as follows:

Examined by Mr. Bremner:

Q. Mr. Miller, you are in the employ of the Minneapolis and St. Louis Railroad Company?
A. Yes.
Q. Residing in Minneapolis?
A. Yes.
Q. How long have you been in the employ of this company?
A. I have been continuously employed now for twelve years, and I was employed off and on before that by it too.
Q. And where are you employed at the present time, and in what capacity?
A. Section foreman of the Railroad Transfer Company.
Q. You aren't in the employ of the Minneapolis and St. Louis now; you are section foreman of the Railroad Transfer Company, are you?
A. Yes.
Q. How long is it since you left the employ of the Min-
107 neapolis and St. Louis?
A. First of October, 1913.
Q. Prior to October 1st, 1913, you were employed as a section foreman at the Minneapolis yard?
A. Yes.
Q. Of the Minneapolis and St. Louis railroad?
A. Yes.
Q. And you were the foreman on May 22nd, 1912, which is the date that Gust Nanos was killed?
A. Yes.
Q. He was a member of your gang, was he not?
A. Yes.
Q. What time of the day did the accident happen?
A. As far as I recollect it was shortly before three o'clock in the afternoon.
Q. How many men were employed in your gang at that time?

A. Ten men.

Q. Where had you been working just prior to the time Mr. Nanos was killed?

A. We were taking out the rotten ties in the northbound main track.

Q. That is the middle tracks?

A. Yes.

Q. How far from the switch were you working, the northbound switch?

A. From 100 to 125 feet.

Q. Were you around with the gang during the day?

A. Yes, I was with them all the time, that is, except right
108 when the accident happened I was called away on account of a little derailment that occurred about four blocks from there you know.

Q. How long before the accident happened were you called away?

A. Oh, not more than ten minutes.

Q. Now, prior to that time and prior to your being called away had you seen a switch engine in that vicinity?

A. Yes, sir.

Q. And where was that switch engine working?

A. In the south end of the Kenwood yards and the lead, switching.

Q. Did that engine in its movements get as far south as where the gang was working?

A. Yes.

Q. How long a time had that switch engine been working on that track?

A. As far as I recollect about three-quarters of an hour; it might have been a little more.

Q. That is prior to the time you left?

A. Yes.

Q. That engine during the time you refer to was moving back and forth on that lead?

A. Oh, they would pull out of the track and yard in on the other tracks maybe five minutes or so and then be back again.

Q. Did you see the accident?

A. No, sir.

Q. Where were you when the accident occurred with reference to the place of the accident?

A. I was about a quarter of a mile south of the place.

109 Q. How did you first receive word that an accident had happened?

A. Just the switching crew. Well, it was a switching crew that works at the elevator that notified me there was a guard rail loose, it had a pair of wheels off you know, I had to fix it you know.

Q. When did you first learn that Mr. Nanos had been hurt?

A. The engine that struck him they come up, right away after the accident they come up to where I was working with his guard rail; there was a switch come up to the main line and they had to come up there you know to take this man to town.

Q. What did you do then?

A. I went right with the engine to where the accident was.
Q. Did you get off there?
A. Yes.
Q. Did you go down town with it?
A. No.
Q. Did you examine the tracks or marks?
A. Yes.
Q. Was there anything by which you could tell where Nanos was when he was struck?

Mr. Leonard: That is objected to as incompetent and calling for an opinion of the witness.
The Court: Objection sustained.

Q. Will you tell us what marks you found on the rails and on the ground?
110 A. We found the ties in the siding, just outside of the rail it appeared as though something had been dragging pretty hard, and some hair of his head was left on the ties, and there was a little bit of a mark which showed where he was struck too, from his feet you know.
Q. At the point where you found the first marks north, were there any ties between the main track and the sidetrack?
A. I didn't quite catch the question.
Q. At the point where you first found towards the north marks, these feet marks that you refer to, and the first mark showing that something had been dragged, were there any ties between the main track and the sidetrack at this point?
A. No.
Q. How far from that point were there any ties, that is, how close to that point were there any ties between the tracks?
A. Oh, about six feet.
Q. Which way?
A. South.
Q. Were there any north?
A. No.
Q. Now, when you say six feet south, six feet south of what?
A. Of the place where Nanos stood when he was struck.
Q. When you say the place where Nanos stood when he was struck, you determined that from the marks you found on the ground?
A. Yes, sir.
111 Q. Now, Mr. Miller, I wish you would just describe to us the process of taking a tie out from underneath the track, the usual and ordinary practice?
A. Well, the way we generally do it and the way we done it in this case, they have to dig the dirt away from one side of the tie, they throw some in the center in order not to pile it too high, and they will have to continue it outside so they can knock the tie loose and pull it out.
Q. And in pulling it out—strike that out.
Q. After a tie has been pulled out, assuming it has been pulled

out directly across the track, that is perpendicular of the track, what is the possibility of a train or other trains striking that tie?

Mr. Leonard: That is objected to as incompetent, irrelevant, immaterial and no foundation laid.

The Court: I think the witness should state the conditions of things there, and then you can show the height of the oil box, and so forth, above the rail, and then it is for the jury to say.

Q. Well, Mr. Miller, the ties that were being taken out of the track, were they standard ties?

A. Yes, sir.

Q. What are the dimensions of standard ties?

A. They are eight feet long and about six inches thick and from seven to eight inches wide.

Q. Do you know what the height of the rail above the ties is, standard rails such as we have out there?

A. Five inches.

Q. How was the ground between the main track, north-
112 bound main and the sidetrack and near or about the point where this accident occurred, that is with respect to the elevation as compared with the ground and the track between the rails?

A. It was a little depressed; about five feet lower than the top of the ties in the main line.

Q. You don't mean five feet?

A. I mean five inches.

Q. Do you know the height of an oil box on a wheel of a freight car above the top of the rail?

A. Not exactly but pretty close.

Q. Well, what is it approximately in your judgment?

A. It is about twelve inches.

Q. About twelve inches?

A. Yes.

Q. About how far will an oil box on a wheel project outside of the rail?

A. About twelve inches.

Q. No, no, outside of the rail, I say. How far will it project outside of the rail, if any?

A. About twelve inches.

Cross-examination.

By Mr. Leonard:

Q. Mr. Miller, when did you examine that ground since the accident?

A. About five minutes after the accident.

Q. Why did you examine it?

A. Well, why did I examine it?

Q. Yes, why did you examine it?

A. I was interested to find out how the man got killed there you know.

113 Q. You say the first thing you knew about the accident was from the crew of the engine that was carrying him to town?

A. Yes.

Q. And you yourself don't know how long that was after the accident?

A. Well, I know just how the train—I could see the trains you know.

Q. You could see the trains what?

A. From where I was I couldn't see the accident, but I know just when the train passed that point.

Q. Which train passed?

A. The switch train, yes.

Q. How do you know what time the switch train passed there?

A. Well, I don't know when the switch train passed there, but I know when the freight train passed there.

Q. Did you know exactly the time the freight train passed there?

A. Well, no, not according to the watch; I had my eye on it and saw the freight train when they were almost on the spot.

Q. Did you go north or south of the place of the accident when you were called to help out in this derailment?

A. I went south.

Q. You went away from the yards?

A. Yes.

Q. Towards Lake Calhoun?

A. Yes.

114 Q. Or was it away from Lake Calhoun?

A. Well, it is pretty close towards Lake Calhoun.

Q. Going to town, the engine wouldn't go to Lake Calhoun carrying this man to town, would it?

A. No.

Q. This switch engine that had him on this engine had gone down where?

A. It went down on the lead track.

Q. How far?

A. About quarter of a mile.

Q. And you were working on the main track?

A. No; the derailment that I was just fixing, that was on the sidetrack.

Q. That was also on the lead track?

A. Yes.

Q. Had you fixed the derailment?

A. Yes, practically.

Q. How long did you stay there working on this derailment?

A. About ten minutes.

Q. What was it?

A. It was a wheel of an engine that had been off the track.

Q. And it took you only ten minutes to put the engine back?

A. No; the engine was put back, but the rail was loose and it required a few spikes to hold it in safe.

Q. Gust Nanos was still alive?

A. Yes.

115 This engine had to make the main track from the place where you stood?

A. Yes.

Q. And it went out on the main track?

A. Yes.

Q. Did you go to town with the switch engine?

A. No; I went as far as where Gust Nanos was.

Q. You mean you went to the place where these men were working?

A. Yes.

Q. You got off the engine?

A. Yes.

Q. You examined the place?

A. Yes, I looked it over.

Q. Did you examine it with reference to any ties?

A. Oh, yes, I noticed everything there.

Q. You noticed between the sidetrack, this lead track that goes south and the main track there was a number of ties, didn't you?

A. Yes.

Q. A large number of them, old and new?

A. Yes.

Q. About how many would you say?

A. Oh, of course they covered quite a distance you know.

Q. Well, how long a distance?

A. We probably had for a distance of maybe about two hundred feet some ties between the tracks.

116 Q. And to the best of your recollection how many ties were there lined between the sidetrack and the main track in this distance of two hundred feet?

A. Well, I think maybe it was about from thirty-five to forty.

Q. And had you piled up new ones which were intended to replace the old ones, were they piled up?

A. Well, there wasn't any as far as we had gone and the new ties were unloaded all along the southbound track; most of them were outside of the southbound track.

Q. Most of those ties were pulled out towards the sidetrack?

A. I think so, yes.

Q. And as they were pulled out towards the sidetrack the men would go out towards the southbound track and pick out the new ties and shove them in?

A. Yes.

Q. You don't know within a foot the exact spot where Nanos stood, do you?

A. No. The only thing that I saw was there were some marks where it commenced to scratch up the ground, of course it showed.

Q. This ground between the sidetrack and the main track is all pretty well covered with gravel?

A. Yes.

Q. And solid?

A. Yes.

Q. It hadn't rained for days prior to May 22nd?
A. No, sir.
117 Q. It hadn't rained that day?
A. No, sir.
Q. The air was dry and light?
A. Yes.
Q. And the ground was dry?
A. Yes, it was ordinarily dry.
Q. There was no clay in the ground?
A. No, sir.
Q. All fine, good gravel?
A. Yes.
Q. When I say "fine" I mean small, good gravel?
A. Yes.
Q. What do you mean by good gravel?
A. I mean ordinary coarse gravel, not too coarse.
Q. And these men had worked around there, around these ties and around the tracks all that morning?
A. Yes, sir.
Q. And they walked with their feet, didn't they?
A. Oh, yes.
Q. Do you mean to say that you saw an imprint in this coarse gravel of the foot?
A. No; it was a hard scratch.
Q. What kind of a scratch was that on the ground? Just describe it, give us an idea. How big a scratch; how deep a scratch?
A. Oh, maybe a couple of inches deep.
Q. And was that the only scratch that you saw in that ground?
118 A. No, no.
Q. Did you look for any other scratches?
A. Well, I don't know really what you mean by scratches.
Q. Well, scratches like this that you saw there, did you look for any other?
A. Well, there was no other to look for only the foot-print. Ordinary foot-prints will show a little bit, they wouldn't show very much.
Q. Did you see foot-prints there?
A. I think so. I didn't pay any attention to any plain foot-prints, no.
Q. So you didn't see any plain foot-prints?
A. No, I didn't pay any attention to that.
Q. What made you think this scratch made by Nanos wasn't made by any other of the boys there, or by a tie or spike?
A. Well, I just saw where the man had been struck; it showed where the body had been dragging.
Q. How long a distance did it show it was dragged?
A. I think about twenty-five feet or so.
Q. How did you know he was struck by this switch engine?
A. I didn't know.

Q. Why did you look for foot-prints near this track, southbound track?

A. I was told he was struck right there.

Q. Where did you examine where the ties were laid?

A. We have an ordinary way of putting out ties; or course
119 when they have got the tie to clear the main line rail they would pull it south you know.

Q. Straighten it out south and north?

A. Yes.

Q. So the tie would run north and south?

A. Yes.

Q. That is, after they pulled out the tie to turn around they would leave it between these tracks?

A. Yes.

Q. So that the long end would be running north and south?

A. Yes, sir.

Q. Now you say you saw ties six feet from the place where Nanos was struck?

A. That is the nearest one.

Q. Would you say as much as five and a half feet?

A. I didn't measure that distance, we had to clear the place where the new tie was to come in, it was about six feet.

Q. You think that the first tie you saw there on the ground was about six feet from where Nanos was struck?

A. Yes.

Q. In the same direction where he was dragged, towards the south?

A. Yes.

Q. He was dragged south or north, which?

A. He was dragged to the south.

Q. How long are the ties?

A. Eight feet.

120 Q. Now, as they dug out these various trenches they threw a lot of dirt between the tracks, dirt and gravel?

A. On account of the track was a little bit depressed between the siding and the main line it wasn't necessary to dig out very much, just a little.

Q. About how many inches deep?

A. Oh, about six inches right close to the ties, and then about two feet out it wasn't necessary to dig any.

Q. In other word, two feet out of the projection——

A. About the end of the tie.

Q. About six inches deep?

A. Yes.

Q. On the sides of the tie how much did you have to dig out?

A. It depends how the tie was.

Q. Well, the ordinary length?

A. About seven or eight inches.

Q. I mean on either side of the tie as it projects?

A. Just one side.

Q. Why did you have an order there to thave these ties laid running north and south; why did you order them to do that?

A. Because that would be the most convenient way to clear the men and the tracks, to have them out of the way until we had a chance to pick them up.

Q. That would be the most convenient way to keep the
121 tracks clear?

A. Yes.

Q. You said that the oil box of the ordinary car is about twelve inches above the rail?

A. Yes, about that.

Q. And it projects twelve inches, the rail?

A. Yes, about that.

Q. On either side of the rails?

A. Yes.

Q. That is, the west wheel of the car would have a box projecting twelve inches to the west and the east side of the car would have a box projecting twelve inches?

A. Yes.

Q. How much would the cars themselves project beyond the rail?

A. They average about eight feet in width; they will project about, pretty near a foot and a half or a little more.

Q. They average about eight feet in width?

A. Yes.

Q. How wide is the engine?

A. About the same.

Q. Is it wider than cars or not?

A. Just about the same.

Q. How wide is the tender of an engine?

A. Just about the same.

Q. The width of the body of the tender is about the same as an engine?

A. Yes.

Q. On the side of the tender there are things, such as hooks and things like that?

122 A. Yes, they have some sticking out a little bit.

Q. Now this engine has a guard, hasn't it, that runs down almost to the top of the rails?

A. You mean the foot board?

Q. Yes.

A. Yes, sir.

Q. How long is the foot board?

A. About six inches over the rail.

Q. The foot board on the switch engine is about six or eight inches above the rails?

A. Yes.

Q. And there is a foot board on the tender?

A. Yes.

Q. What is that used for?

A. The man working on the engine to ride on from place to place;

when they move from one place to another on the switch engine they ride on that.

Q. When they are back in the yards they have somebody standing on the foot board?

Mr. Bremner: That is objected to as incompetent, irrelevant and immaterial under the pleadings.

The Court: Objection sustained.

Recess 12 to 2 P. M.

Q. Mr. Miller, so there may be no misunderstanding about the way these ties were supposed to be placed between the tracks, when you say they were laying north and south you mean parallel with the tracks?

A. Yes.

Q. Now, you spoke about a foot board on the switch engine?

123 A. Yes.

Q. You said that was about six or eight inches above the rail?

A. Yes.

Q. How wide is that footboard?

A. About ten or twelve inches.

Q. Is it as long as the tender or the engine?

A. Yes.

Q. Is it longer than the width of the engine?

A. Just the same.

Q. The cowcatcher, how high is that above the rails?

Mr. Bremner: That is objected to as immaterial and not proper cross examination.

Mr. Leonard: Withdrawn.

Q. How long did you work in the Kenwood yards?

A. Regularly four years.

Q. About two years before this accident?

A. Yes, sir.

Q. Steady?

A. Yes, sir.

Q. As section foreman?

A. Yes, sir.

Q. And did you during that time see a large number of engines used by the Minneapolis and St. Louis railroad?

A. Yes, sir.

Q. You have seen off and on hundreds of them?

A. Oh, well, I saw the same one.

Q. You have seen it hundreds of times?

124 A. Yes, sir.

Q. Did you observe any cowcatchers on any of the engines?

A. They had a pile of cowcatchers on all the road engines pulling trains on the road.

Q. Did they have cowcatchers on the freight engines?
A. Yes.
Q. They are in front of the engine?
A. Yes.
Q. The bottom of these cowcatchers is how high above the top of the rail?

Mr. Bremner: That is objected to as immaterial and not proper cross examination.
The Court: Objection sustained.
Mr. Leonard: I offer to prove by this witness that the cowcatcher of the freight engines used by this company is about an inch or two inches above the rail and projects on either side of the rail from twenty to twenty-two inches.
Mr. Bremner: That is objected to as immaterial and not proper cross examination.
The Court: Objection sustained.
Mr. Leonard: Exception.

Q. Do you know where the exhaust pipe is on an engine?
A. I am not an expert on engines, that isn't my line, only what comes before my direct observation.

GEORGE L. COOLIDGE, after being first duly sworn, testified as follows:

Examined by Mr. Bremner:

125 Q. Mr. Coolidge, you reside in Minneapolis?
A. Yes, sir.
Q. Employed by the Minneapolis and St. Louis Railroad Company?
A. Yes.
Q. As an engineer?
A. Yes.
Q. How long have you been in the employ of the Minneapolis and St. Louis Railway Company?
A. Twenty-three years.
Q. How long have you been employed as locomotive engineer?
A. Seven years.
Q. Prior to that time were you employed as fireman?
A. Yes. I went to the machinist trade first, the first five years.
Q. Do you recall the day on which Mr. Nanos was struck by a switch engine in the yards, at the south end of the Kenwood yards?
A. Yes, sir.
Q. The evidence here shows that was May 22nd, 1912. On that day, Mr. Coolidge, on what train were you employed as an engineer?
A. Train 95.
Q. Now, what is the position of an engineer in the cab of an engine, Mr. Coolidge?
A. Well, the position is on the right side of the engine.
Q. That is, he looks out on the right side?
A. Yes.

Q. Number 95 is a train that runs from where to where?
126 A. Albert Lea to Minneapolis.
Q. On this day as you approached the Kenwood yards—strike that out.
Q. Did you see Mr. Nanos struck?
A. I did; yes, sir.
Q. Now, as you approached the yard on that day tell us what signals you gave?
A. As I was coming into the Cedar Lake yards I whistled for the crossing just south of the Kenwood yard.
Q. How far was that from the place where the accident occurred?
A. Oh, I don't know, it may be twenty car lengths, and as I came alongside of the lead track I saw Mr. Miller up at the south end of the pullback there and he gave me a motion with his hand, and I blowed my whistle again as I saw the men working on the track.
Q. Where were the men working?
A. On the northbound main line.
Q. That is the center track?
A. Yes.
Q. Was the bell ringing?
A. Yes.
Q. What kind of a bell have you?
A. An automatic air bell ringer.
Q. Are you familiar with the other engines of the Minneapolis and St. Louis?
A. Yes.
Q. Are they or are they not equipped with an automatic air bell ringer?

127 Mr. Leonard: That is objected to as incompetent, irrelevant and immaterial.
Mr. Bremner: I will withdraw the question.

Q. You say your bell was ringing and it was an automatic bell?
A. Yes, sir.
Q. Mr. Coolidge, as you approached these men that were working on the track what did they do?
A. When I was about six or seven car lengths I blowed the whistle and they got off the track.
Q. Which way did they get off?
A. They all got off on the west side except two, and those got off on my side.
Q. Did you continue to see those men as you approached them?
A. I saw them standing there, yes, sir.
Q. What were they doing?
A. They were standing on the west rail of the lead track.
Q. Did you see them engaged in any work?
A. No, sir.
Q. As you passed these men with your engine how close would you be to them?

A. Well, I would be perhaps—they were standing on that track—well, it might be eight feet from the side of the engine.

Q. Was there anything to prevent you seeing them?

A. No, sir.

Q. What kind of a day was that?

A. I can't remember that.

Q. As you passed them what were they doing?

128 A. They were standing there looking south, two of them very close together, and they were both looking down south.

Q. When did you first see the switch engine?

A. After I had passed these men, about a car length I guess.

Q. Where was the switch engine with reference to your engine?

A. Well, it was just a little ahead of where my engine was.

Q. As the switch engine approached you what did you do?

A. I glanced at it and kind of looked at it as it went by, I kind of watched it a little, and then when it went by I looked around to see who was on the engine.

Q. What did you see?

A. The fireman was putting in the fire, and I looked around and back and saw the back end of the switch engine hit this man.

Q. Did you at any time as you approached these men and went by them—I am referring now to the two men on your side of the engine—see them engaged in any work of any kind?

A. No, sir.

Q. How fast were you running?

A. About ten miles an hour.

Q. How far away were you from this bunch of men as they stepped off the track?

A. About six or seven car lengths, just this side of the crossing.

129 Cross-examination.

By Mr. Leonard:

Q. You saw this man struck you say?

A. Yes, sir.

Q. As you were approaching the yards, the real yards commenced just about where the switch stand is on this sidetrack, and then there are various tracks diverging from these lines?

A. Yes, sir.

Q. Showing you defendant's Exhibit 1, I will ask you when you speak of the Kenwood yards if you don't speak of that portion of Exhibit A which is north of this canal bridge?

A. Yes, sir; that is the yard.

Q. Did this accident occur in the yards?

A. It occurred just outside of the yard switch.

Q. How far outside of the yard switch?

A. Well, I don't know exactly, I didn't take particular notice, I think they was back perhaps a couple of hundred feet.

Q. Then you knew that there was an accident happened before you got down to the station?

A. Yes, sir.
Q. You didn't stop?
A. I did not, no, sir.
Q. How many cars were there attached to this switch engine?
A. Five or six cars if I remember right.
Q. And which track did it come from when you first saw them?
A. I couldn't say exactly, but they come back and started to pull back up this lead track when I saw them when they went
130 by me.
Q. In order to do that the last car of the train has to pass by the switch stand?
A. Yes.
Q. Towards south?
A. Yes.
Q. Did you see the cars pass the switch stand?
A. No, sir.
Q. You kept your eyes all the time in front of your own train?
A. Yes, sir; I did. When the switch engine came along then I looked as it went by me. When it got parallel with me I glanced over toward it and looked back.
Q. Where were you at the time when the switch engine passed you?
A. I was on my seat.
Q. Where was your engine?
A. Just about opposite the switch stand.
Q. It was opposite the switch stand when you were passing the switch engine?
A. Yes, sir.
Q. On which side of the engine was the tender, or on which side of the switch train was the tender?
A. On the rear of it.
Q. So as it was going southward the switch tender was in front of the train?
A. Yes, on the back we call it.
Q. How far was it from the end of the tender as it was going to the cab of the engineer?
A. Oh, about twenty-five feet.
131 Q. So when the switch engine was passing you and the cab of the engine was in line with your view, or with your cab, the front of the tender was twenty-five feet ahead?
A. Yes, twenty-five feet back of me.
Q. And they continued going?
A. Yes.
Q. And the switch engine continued going?
A. Yes.
Q. You say you looked to see who was the engineer?
A. I just looked there to see if I noticed who the crew was.
Q. Did you expect an accident?
A. No, sir; I did not.
Q. You didn't look to see whether these two fellows would get hurt?

A. No. I just happened to turn around in my seat of my engine as he went by me, and I saw him knocked down and he was rolling.
Q. Where does the curve start with reference to the switch stand?
A. It is about parallel with the switch stand, a little bit north I think.
Q. Did you continue your journey on the northbound main?
A. Yes, sir.
Q. Was this man that was struck facing south or north?
A. He was facing south when I passed him.
Q. When he was struck which way was he facing?
132 A. South, yet.
Q. Which way was the other man facing?
A. Same way, a short distance beyond him.
Q. Did you see anything on the ground?
A. No, sir.
Q. Was there anything on the ground between the main track and the sidetrack?
A. I didn't notice.
Q. Was there any picks or shovels?
A. I didn't notice.
Q. Was there any ties?
A. I couldn't say.

Redirect examination.

By Mr. Bremner:

Q. You say the Kenwood yard begins at the switch which is now close to the bridge over the lagoon between Cedar Lake and Lake of the Isles?
A. Yes.
Q. Is that the main Kenwood yard?
A. That is the beginning of the main Kenwood yard.
Q. The lead track on which this switch engine was running, isn't that a part of the Kenwood yard?
A. Yes.

Recross-examination.

By Mr. Leonard:

Q. Did this engine that you were running have a cowcatcher on?
A. Yes, sir; it had a pilot.
Q. How high is the pilot above the top of the rails?
133 A. About four inches.
Q. How much does the pilot project on each side of the rails?

Mr. Bremner: That is objected to as not proper cross examination and immaterial.
The Court: Objection sustained.

ADOLPH KARLSON, after being first duly sworn, testified as follows:

Examined by Mr. Bremner:

Q. Mr. Karlson, you reside in Minneapolis?
A. Yes, sir.
Q. You are employed by the Minneapolis and St. Louis Railroad Company as fireman?
A. Yes, sir.
Q. How long have you been in the employ of that company?
A. Four years and eight months as fireman, a little over four years.
Q. Mr. Karlson, you were fireman on train 95 with engineer Coolidge on the day that Mr. Nanos was killed near the south end of the Kenwood yards?
A. Yes, sir.
Q. As you approached the Kenwood yards what signals were given?
A. The engineer gave the usual crossing signals, two long and two short whistles before we got to the Kenwood yards, and a little bit inside of the lead switch off the main line there is a crossing, and about that time the engineer whistled again.
Q. Where were you at the time?
134 A. On the left side of the engine, on my seat box.
Q. Were you looking out ahead?
A. Yes.
Q. What did you see ahead of you?
A. After we got down the straight track I saw a bunch of men working on the northbound main track.
Q. That is the center track of the three at that point?
A. Yes.
Q. What did you see them do?
A. So far as I can remember now they were working in the middle track, either putting gravel under the ties or some other work like that.
Q. What did they do when you approached?
A. They stepped off the track.
Q. Which side?
A. Some stepped over to my side and a couple, if I remember right, stepped off on the engineer's side, on the right side.
Q. Did you see these two men who stepped off on the engineer's side after they got off the track?
A. Why, yes, for a little while.
Q. What were they doing?
A. Nothing that I know of.
Q. Just standing there?
A. Yes, as far as I know.
Q. As you approached them the head end of the engine cut off your view—is that right?
A. Yes, sir; that is right.
Q. You didn't see the accident?
135 A. No, sir.
Q. Was the bell ringing?

A. Yes, sir.
Q. Was the engine equipped with an automatic ringer?
A. Yes.

Cross-examination.

By Mr. Leonard:

Q. That is your engine was equipped?
A. Yes.
Q. What were you doing at the time you looked at the men?
A. I was sitting on my seat box, looking right ahead.
Q. On which side of the engine?
A. On the left side of the engine; I was on the west side of the northbound main line.
Q. While you were sitting on the west side of the engine did you see these men?
A. Yes. You can see clear across on a straight track when you have some article in view about sixty feet from the engine. The boiler of the engine is narrower than the cab; the cab is about three feet wider than the boiler.
Q. How wide is the boiler?
A. Oh, all depends on the size of the engine.
Q. Well, this engine?
A. The boiler would be between four and five feet wide on this engine, but then the back end of the boiler is wider, or the extension of the front end of an engine is smaller than the back end of the boiler.
136 Q. Who has charge of the exhaust of the engine?
A. Nobody that I know of.
Q. Do you know where the exhaust is?
A. Yes.
Q. Where is it?
A. On both sides of the engine when it is working.
Q. Where is it?
A. At the front end, through the smokestack.
Q. Is there any stream emitted from any parts close to the rail?
A. No, sir; only in certain cases when the boiler gets too full the engineer may open the cylinder cocks and let the water escape through the cylinders.
Q. You say you were sitting on your box; how high were you above the rails?
A. From nine to ten feet.
Q. So that looking straight out from your cab what attracted your attention to these men?
A. Oh, same as anything else, any object on the right of way that you are running on attracts your attention.
Q. There were six men on your side?
A. I didn't count them.
Q. There was quite a few men on each side?
A. Yes.
Q. What were they doing?
A. They were standing and looking.

Q. When you say you saw these two men standing and doing nothing did you also see the other men standing and doing
137 nothing?

A. I saw two men on the engineer's side, as far as I recollect they were doing nothing.

Q. How far away were you when these two men stepped off?

A. Oh, I should judge seven or eight car lengths.

Q. You don't know what they did afterwards?

A. No, sir; they passed out of my view.

Q. What is the ordinary length of a car?

A. Well, it all depends on the size.

Q. Well, on that train on that day?

A. Thirty-eight feet is the average of a car.

Q. That is for the body of the car?

A. That is the average length of what they figure a train length by it.

BERNIE E. COLLINS, after being first duly sworn, testified as follows:

Examined by Mr. Bremner:

Q. Mr. Collins, you reside in Minneapolis?

A. Yes, sir.

Q. You are employed by the Minneapolis and St. Louis Railroad Company?

A. Yes.

Q. How long have you been employed by that company?

A. About four years and two months.

Q. In what capacity are you now employed?

A. Brakeman.

Q. How long have you been employed as a brakeman?

A. Four years and two months.

138 Q. On the day Mr. Nanos was killed here in the Kenwood yards in Minneapolis you were the head brakeman on train 95, were you not?

A. Yes.

Q. Where were you as your train approached there?

A. On top of the car.

Q. Do you recall what signal was given by train 95 as you approached the Kenwood yard?

A. Yes. He whistled for the crossing up there, two long and two short; that is the only one I remember.

Q. Was the bell ringing?

A. Yes, sir.

Q. As you approached the Kenwood yards did you see any men on the track?

A. No, I didn't until our engine passed them.

Q. What men did you see then?

A. I saw two men on the right side.

Q. What were they doing?

A. One was standing with one foot on the east side of the rail, looking south at the train as we went by.
Q. What was the other doing?
A. He was standing there by the side of the other fellow.
Q. Did you see these men do any work as you went by?
A. No, sir.
Q. Did you see the accident happen?
A. Yes, sir.
Q. When did you first notice the switch engine?
139 A. About a car length away from them, a car or a car and a half.
Q. How far beyond where the—As you went by these men standing on the track what did you do?
A. Well, I yelled at them as hard as I could, but I couldn't make them hear.
Q. You yelled at them as they stood on the track?
A. Yes.
Q. How far had you gone by the place where the accident happened when the switch engine struck Gust Nanos?
A. About two cars.
Q. Up to the time that Mr. Nanos was struck did you see him doing any work?
A. No, sir; he wasn't doing any work.
Q. What was he doing?
A. Standing there looking down at the wheels of our train as we went by.

Cross-examination.

By Mr. Leonard:

Q. How old are you?
A. Twenty-four years old.
Q. How long have you been in the employ of the Minneapolis and St. Louis railroad?
A. Four years and two months.
Q. When was the first time you spoke to anyone about this accident?
A. Well, the first one I spoke to was the engineer.
Q. When was that?
A. When we got down to the roundhouse.
140 Q. He was the first man you told about it?
A. Yes, sir; the switchman was there, I hollered to him.
Q. You hollered to the switchman?
A. Yes, and I hollered at two men on the track too.
Q. Which switchman did you holler to?
A. Well, they were all on the other side of the cars.
Q. When you say on the other side of the train, what do you mean by that, west or east?
A. East.
Q. When you say "all", whom do you refer to when you say they were all on that side of the train?
A. Well, I suppose they were on that side of the train.

Q. Who?
A. Well, the switchman that was working on that switch train.
Q. Did you see him?
A. No.
Q. What do you mean when you say you hollered at them?
A. Well, I hollered at whoever was there.
Q. Did you see any switchman?
A. I did after we pulled by the switch engine.
Q. Where was he?
A. Down by the switch stand.
Q. And was he between the sidetrack and the main track?
A. No, sir.

141 Q. Where was he?
A. He was between the lead and the outer lead, the back lead.

Q. Just step down here for a moment. This is the northbound track that runs to Minneapolis. What do you call the two leads on this map (referring to Exhibit A)? This is the map which purports to show the three tracks south of the switch stand on the lead track; this is the place of the switch stand, and there is a track running down——

Mr. Bremner: I object to the further use of this plat, Exhibit A; it has never been identified, I object to it as incompetent, irrelevant and immaterial in any way, shape or form, it has never been properly identified.

Mr. Leonard: Plaintiff's Exhibit A is offered in evidence.

Mr. Bremner: Defendant objects to the offer as incompetent, that hasn't been properly identified, never identified in any way, shape or form, and no testimony has been offered tending to show what the plat purports to show even other than the statements of counsel.

Mr. Leonard: I am offering it for the purpose of showing the relative position of the tracks.

The Court: I think I will let the witness testify as to it.

Mr. Bremner: Objection withdrawn.

Q. When you say that the switchman stood at the switch stand between the two leading tracks that you have mentioned, just

142 indicate on this map where they stood.

Mr. Bremner: He didn't say "leading tracks", he said lead tracks.

Q. Well, the lead track?

Mr. Bremner: That is objected to as incompetent, irrelevant and immaterial.

The Court: Objection overruled.

Q. Do you understand this map?
A. No, sir; I don't.
Q. This is the southbound track; the middle track is the northbound track; this is the lead track running into the switch and the Kenwood yards, going north of town.

Mr. Bremner: This is the back lead switch.

Q. Do you know which track you were coming in on?
A. We were going on the north main track.
Q. You say you saw the switchman of the switch train standing at the switch stand—is that correct?
A. Yes. After we passed the switch engine with a string of cars I saw him standing over there, I don't know whether he was standing, I was trying to get somebody's attention called to the fact that that man was hit.
Q. How soon you saw the man was hit, how soon after that did you see the switchman?
A. That is hard to say, I don't know.
Q. Well, how many car lengths did you go before you saw the switchman?
A. About five or six cars.
Q. Did you have to look back, or was he on a line with
143 you?
A. He was on a line with me.
Q. Between what track was he standing?
A. He was standing between the lead track and the back lead, somewheres there.
Q. How far was he from this switch train?
A. About a car length back of it.
Q. Had this switch train passed the switch stand of this lead track, the back lead you call it, had the whole switch train passed that back lead?
A. Yes.
Q. You say the switchman stood about one car legnth behind it?
A. Yes.
Q. How far south of the switch stand was the last car of the switch train?
A. I couldn't say.
Q. How many cars was there in the switch train?
A. Five or six.
Q. Did you see anything on the ground when you saw these two men between the cars?
A. No, sir; there was nothing on the ground that I noticed.
Q. Did you see any picks?
A. One of them had a shovel in his hand.
Q. You are sure it wasn't a pick?
A. I am not sure whether a pick or a shovel.
Q. Did you see any ties there?
A. No, sir; I did not.
Q. Are you sure there were no ties?
A. I couldn't say to that.
144 Q. How far were you on the main track from these two men when you first observed them step off the track?
A. About three car lengths or two cars.
Q. When you say three car lengths, do you mean that the front of the engine was three car lengths away?
A. With the engine and the car behind the engine three car lengths.

Q. When you first saw him do you mean to say they were right in front of the engine?

Mr. Bremner: That is objected to.

Q. Did you see these two men step off the track?

A. No, I didn't. After the engine went by them I saw them, that is the first time I saw them.

Q. The first time you saw them was when they appeared in line with your car?

A. No, I saw them before that.

Q. You were about three car lengths from them?

A. No.

Q. About how far were you?

A. When I saw them I was about three car lengths from them when they stepped outside, that is the first I saw of them.

Q. Where was the switch engine, how far was that away from them?

A. That was down there about four or five car lengths I should judge.

Q. And the switch engine was coming towards them?

145 A. Yes.

Q. Did you see the engineer on the switch engine?

A. No, sir.

Q. Did you see anybody on the engine?

A. I saw the fireman putting in the fire.

Q. Was this switch engine going faster or slower than your train?

A. Yes, it was going slower.

Q. As you passed these men you didn't expect an accident?

A. No, sir.

Q. You say you didn't look back?

A. No, sir.

Q. Then what makes you say that you called the attention of the fireman that an accident happened?

A. Well, I seen when the switch engine hit this man.

Q. If you didn't look back how could you see the switch engine hit the man?

A. Well, I saw it hit him just as I was even with him.

Q. How far was the switch engine then south of the switch stand?

A. I couldn't say.

Q. Were you looking at these men as the switch engine was approaching them?

A. Yes, sir; I was yelling at them trying to draw their attention to it.

Q. They were facing south you say?

A. Yes.

146 Q. And you were looking north?

A. I was up on top and looking down on them.

Q. They were facing towards you and you were facing towards them?

A. Yes.

Q. You say you hollered to them and made a motion of your hand?
A. Yes.
Q. And you couldn't attract their attention?
A. No, sir; they were looking at the wheels of the train.
Q. How far was the switch engine from these men when you first realized the switch engine was going to hit them?
A. About a car length.
Q. And you were then how far from them?
A. I was then about even with them.
Q. Then you had to turn around to see the accident?
A. Yes, sir.
Q. When you saw that switch engine four car lengths away were these men still looking south?
A. Well, I didn't pay much attention to what they were doing then, they were standing there.

Redirect examination.

By Mr. Bremner:

Q. Where were these men when you saw them in respect to the lead track?
A. The one that was hit was standing facing south; one foot over one rail and the other over another rail, and the other man was standing close to his shoulder.
147 Q. What you mean is that he had one foot on the east side of the west rail?

Mr. Leonard: That is objected to as leading.

By the Court:

Q. What do you mean when you say that?
A. He had one foot on the west side of the west rail and one foot on the east side of the rail.
Q. That is he was just straddling one rail?
A. Yes, sir; he was straddling one rail.

JOHN ROBERTS, after being first duly sworn, testified as follows:

Examined by Mr. Bremner:

Q. Mr. Roberts, you live in the city of Minneapolis?
A. Yes, sir.
Q. What is your present employment?
A. I am switching for the Minnesota Transfer Railway Company.
Q. You were formerly employed by the Minneapolis and St. Louis Railroad Company?
A. Yes.
Q. How long did you work for that company?
A. Six years.
Q. In what capacity?
A. Switchman.

Q. And part of the time as switch foreman?
A. Yes.
Q. And you were switch foreman in the Kenwood yards on the day that Mr. Nanos was killed near the south end of the yards in 1912?
A. Yes.
Q. You were foreman of the crew that were using the en-
148 gine that struck Mr. Nanos?
A. Yes.
Q. Do you recall the fact that he was struck?
A. I do.
Q. And do you know about the place where he was struck, his place on the track I mean?
A. Yes, I know very near the place.
Q. How long prior to the time that Mr. Nanos was struck had your crew been working on that lead track?
A. Well, I should say an hour or probably a little bit longer than that, I couldn't just tell the exact time.
Q. Tell us what you were doing?
A. Well, I had hold of five or six cars——
Q. No, but generally during that hour?
A. We were switching back and forth on all of those tracks, using the lead part of the time.
Q. You were switching in and out of the Kenwood yards tracks?
A. Yes, using the lead to pull back on.
Q. And during all of the time you were working there—strike that out.
Q. What were you doing?
A. We were distributing cars, classifying them as we call it, placing them on the different tracks where they belonged.
Q. In doing that work tell us how you go about it?
A. Well, those cars are for different firms, we used a track for each firm, we pull back and separate the cars, we pull in on
149 the tracks and place the cars consigned to the man that we use for that.
Q. In doing that do you pull them out on the lead track?
A. Always, yes.
Q. Where was the lead track in reference to the string of cars?
A. It was on the other end of the string entirely.
Q. While you were doing that work did your engine go by this place where Nanos was struck, opposite where these men were working on the main track?
A. Yes, we did.
Q. Frequently or infrequently?
A. Well, frequently.
Q. Do you recall about the time in the afternoon that Mr. Nanos was struck?
A. Why, about 3:30 P. M. as near as I can remember.
Q. Now, at the time that he was struck where were you?
A. I was on the opposite side of the cars.
Q. Do you mean on the east side?

A. Yes, next to the lake.

Q. Tell us what you were doing at that time?

A. We pulled out that five or six cars on No. 1 track; I had cars to distribute on the back lead; to use this back lead I gave the engineer a signal to stop, and also one to come ahead; he didn't move; I didn't know what the trouble was; one of the men said he thought there was a man hurt; I run out then between the main line
150 and the lead and I saw a man on the ground and the other man was over him, he was unconscious, and they took him after that down town.

Q. What did you do then?

A. I had to go to the Kenwood lead in order to get on the main line; we picked him up and put him on the engine before we cut the engine loose from the string of cars, and then we took him to Western avenue for the ambulance. The yardmaster telephoned for the ambulance while I was coming down there.

Q. How long prior to this accident had you been working as such foreman in this yard?

A. Oh, three years, three years or more, I don't know just exactly the date.

Q. Do you know what the custom and practice has been in that yard with reference to the ringing of the bell on the engine?

A. Why, yes.

Q. What was it?

A. If there was anyone on the track to ring the bell as a warning that we were approaching; we rang the bell to avoid an accident.

Q. Was it your custom to ring the bell when the switch engine was moving up and down the tracks, generally speaking?

A. No, it wasn't customary to continuously ring the bell.

Q. When was it customary to ring the bell?

A. If you see a man on the track to ring the bell, to notify him of the approach of an engine.

Q. In a case of emergency?

151 A. Yes, sir.

Cross-examination.

By Mr. Leonard:

Q. In other words, if you saw a man on the track or close to the track looking south and your train was going south, you would ring the bell?

A. I certainly would, yes, sir.

Q. That was customary, was it?

A. Yes, sir.

Q. If a man stood straddled, this way, looking south and an engine was coming from behind, would the engineer ring the bell to give a warning?

A. He certainly would.

Q. Would he also ring the bell if a man was looking south on the track?

A. Yes.

Q. Is that the custom?
A. It is customary to ring the bell if a man was in danger, yes, sir.

JAMES C. O'NEIL, after being first duly sworn, testified as follows:

Examined by Mr. Bremner:

Q. Mr. O'Neil, you reside in Minneapolis?
A. Yes.
Q. You are in the employ of the Minneapolis and St. Louis Railroad Company?
A. Yes.
Q. In what capacity?
A. Engineer.
Q. How long have you been employed in that capacity?
152 A. Seven years and eight months.
Q. And you are operating a switch engine now?
A. Yes, sir.
Q. How long have you been operating a switch engine?
A. Four years ago about the 15th of December.
Q. Do you operate in Kenwood yard?
A. Yes, I was working at this time and at the present time too.
Q. In 1912, in May, were you working in the Kenwood yard?
A. Yes.
Q. Do you recall the day on which Mr. Nanos was killed?
A. Yes.
Q. Were you engineer on the switch engine that struck him on that day?
A. Yes.
Q. Were you running the engine at the time the accident occurred?
A. Yes, sir; I was.
Q. In what direction was your engine headed?
A. East; north or east, whichever way you want.
Q. Headed towards town?
A. Yes.
Q. How long prior to the accident had you been working with that engine and that crew?
A. An hour or so; I don't just recall the time.
Q. During that hour had you been working up and down this lead track on which this accident occurred?
153 A. Yes. We were working there back and forth all of the time up to the time we got the cars and pulled them out again.
Q. What track did you come up on?
A. No. 1; next to the main line.
Q. You came off track No. 1 when Mr. Nanos was killed?
A. Yes.
Q. When you refer to track No. 1, what do you mean?
A. That is the track right here.

Q. That is the track shown on defendant's Exhibit 1 leading off from the first switch north of the canal bridge?
A. Yes.
Q. Now, that first switch you call the lead switch as distinguished from the back lead switch; where is the back lead switch?
A. It is on the south or the west side of the canal bridge.
Q. And then the main lead switch is the first one north of the bridge?
A. Yes.
Q. You lead off track No. 1 to pull this string?
A. Yes.
Q. Before going out on the track which has been referred to here as the lead track, being the track east of the northbound main, what did you do?
A. I looked back and see the track was clear.
Q. Was the track clear?
A. Yes, sir.
154 Q. Was there anything on it?
A. No, sir.
Q. And then what did you do?
A. I backed right up with my string of cars.
Q. How many cars did you have?
A. Well, I don't just remember; five or six cars or something like that.
Q. Whose signal were you taking?
A. Roberts' signal, the foreman.
Q. Where was the fireman at that time?
A. He was putting in the fire.
Q. When did you first learn that there had been an accident?
A. The fireman told me; he says "I guess we hit somebody"; just as I got a stop sign from the foreman I got that just at the same time, he told me that we hit somebody.
Q. Did you get any other signal from the foreman after you got the stop signal?
A. That is all. I went right down over onto the side to see what was the matter.
Q. Did you at any time before the accident see Mr. Nanos?
A. I saw him and another fellow working on the main line there; there was a gang of them but these two was a little bit away from that gang.
Q. The last time you saw them where were they?
A. They were working on the main line.
Q. Did you know that they had left the main line?
A. No, sir; I did not.
155 Q. After you looked back and saw that the track was clear as you testified, which way were you looking?
A. I was looking ahead watching my foreman, looking for signals.
Q. By "ahead" you mean towards town?
A. Yes.

Q. How far did you move after you looked back before you reached the place where the accident occurred?

Mr. Leonard: That is objected to on the ground it doesn't appear that this witness knows of his own knowledge where the accident occurred.

Mr. Bremner: Question withdrawn.

Q. Well, after you were told by your fireman that an accident occurred did you get down off your engine?

A. Yes, sir; I went right down there.

Q. Did you see Mr. Nanos?

A. I saw him and one other fellow there.

Q. Did you go back to see if you could find any marks?

A. Yes. I looked for marks there and looked for marks on the tank, on the engine.

Q. Did you see any marks on the ground?

A. No, sir.

Q. You didn't look for marks on the ground?

A. No, sir; I was looking for marks on the engine.

Q. Where was the body of Mr. Nanos when you got down?

A. About a car length from the engine.

156 Q. Lying between tracks?

A. Yes.

Q. So that you engine and one car had passed him?

A. Yes, sir.

Q. How far would you say you had moved after you looked back and saw that the track was clear to the point where you saw the body of Mr. Nanos?

A. I should judge about three hundred feet, maybe a little more.

Q. What was the practice, the custom with respect to ringing the bell? Was it your practice and custom to keep the bell ringing at all times as you come down the tracks in the Kenwood yard?

A. We were to ring it in case of necessity; we had orders to stop the ringing of the bell as much as possible.

Q. Do you know why the ringing of the bell was eliminated from ringing in that yard?

Mr. Leonard: That is objected to as incompetent, irrelevant and immaterial.

The Court: Objection sustained.

Q. Do you know whether there had been any objection made to the ringing of bells in the yards, in the Kenwood yards?

Mr. Leonard: That is objected to as calling for the conclusion of the witness, incompetent, irrelevant and immaterial.

The Court: Objection sustained.

Cross-examination.

By Mr. Leonard:

Q. Mr. O'Neil, you say the custom in the yards when you
157 were switching isn't to ring the bell?

A. Well, to ring it in case of an accident or ring it at a time when it is absolutely necessary.

Q. You don't ring it after an accident?
A. I should say not.
Q. You ring it before an accident?
A. Yes.
Q. When you see men engrossed in their work on the track of which you were approaching you ring the bell?
A. Certainly.
Q. You would give a man working on the track on which your train was approaching, you would give him a whistle or a bell?
A. Yes.
Q. If you saw a man engrossed in his work on the track and not seeing your train, with his back toward you, you would give him a signal?
A. Certainly, if he was liable to get hurt.
Q. And if he had his back to your engine and he didn't see you you would give him a signal as you were approaching him?
A. Certainly.
Q. That was your custom; that is what you always did?
A. Yes; that is what I meant by preventing an accident. It is the custom to prevent the ringing of the bell as much as possible so as to keep down the noise and smoke and everything else.
Q. If you saw a man in dang-r or about to be hurt you wouldn't care about the noise, would you?
A. No.
158 Q. Are there any residences close by where this accident occurred?
A. Well, all that neighborhood——
Q. This place is between Cedar Lake and Lake of the Isles?
A. Yes.
Q. This is a portion of the city that isn't inhabited much yet. What you refer to about making a noise in the Kenwood yard is five, six or eight or ten blocks further north?
A. Oh, I don't know.
Q. You were facing north?
A. Yes.
Q. Because you wanted to see the signals from the switchman as you were passing?
A. Yes;
Q. How many cars did you have in your train?
A. I should judge five or six, I didn't count them.
Q. How far was the rear of your train from the switch stand on this sidetrack after you stopped?
A. Well, I didn't figure that out. When a man told me there was a man hurt I got right down to take care of that man.
Q. The stop signal was because you had to pass the switch stand in order to switch back on the other track?
A. Yes.
Q. But you don't know how far beyond the switch stand you went?
A. No, sir; I don't.

Q. How far were you north of the switch stand when you
159 looked back to see if your track was clear?

A. Well, that would be——

Q. I mean towards town, away from Nanos, away from the switch stand?

A. You are talking about the back lead switch stand?

Q. Yes. How far were you from that switch stand?

A. Well, I should say two hundred and fifty feet from that switch stand.

Q. So you must have traveled two hundred and fifty feet to the switch stand and the length of your engine and tender and five or six cars before you stopped—is that right?

A. Two hundred and fifty feet I traveled and the length of the train and engine too.

Q. You say before you started moving your train southward you looked back to see if your track was clear?

A. Yes.

Q. How far were you then?

A. About two hundred and fifty feet from that lead track.

Q. Then you backed with your train towards the switch and passed the switch, didn't you—that is correct, isn't it?

A. Yes, sir.

Q. You took your train and pulled the cars beyond the switch south the length of the train—isn't that right?

A. Yes.

160 Q. I will illustrate on defendant's Exhibit 1. The switch stand you refer to is south of the canal bridge?

A. Yes, sir.

Q. You say you were two hundred and fifty feet towards town from this switch when you looked back to see if this track was clear; you were two hundred and fifty feet north, towards town, away from this switch stand?

A. It might not have been that far.

Q. Well, how far would you say?

A. Well, make it two hundred feet.

Q. You certainly were the length of your train; the rear of your train had to be north of this switch in order to make the switch?

A. South of the switch.

Q. What do you mean by that?

A. Away from town.

Q. Your judgment is then you were two hundred feet towards town from this switch stand when you first looked back?

A. Yes.

Q. And you were on the right hand side, were you?

A. Yes, sir.

Q. That is away from the main track?

A. Yes, sir.

Q. That would be on the outer rail of this lead track?

A. Yes, sir on the south rail of it.

Q. That would be the east rail?

A. All right, east then.

161 Q. And you didn't look ahead of you?

A. I looked ahead of me when I was pulling out, I looked to see if the track was clear and everything; you have to keep your eye on the foreman in order to catch the signals and not miss them.

Q. That is all you do, is to watch the foreman?

A. Yes, sir; when I see my track is clear behind him.

Redirect examination.

By Mr. Bremner:

Q. Had you any reason to believe that any of these men employed working on the main track were coming over to the lead track or near the lead track?

Mr. Leonard: That is objected to as incompetent and calling for a conclusion of the witness.

The Court: Objection sustained.

Q. Do you know of any fact which caused you to believe that these men were going to leave the main track?

Mr. Leonard: Same objection.

The Court: Same ruling.

Mr. Bremner: Exception.

Q. Where had these men been working as you were working on this lead track that hour you had been there prior to the accident?

A. They were working on the main line.

Q. Had any of them been working on the lead track?

A. No, sir; not as I recall it; I am pretty certain they were on the main line.

Q. Did you see any of them on the lead track or near the

162 lead track while you were making these movements with the engine during the time these men were at work?

A. No, sir.

Q. Did you see Mr. Nanos standing on the lead track or near the lead track?

A. No, sir; I did not.

Short recess.

PATRICK G. CONNELLY, after being first duly sworn, testified as follows:

Examined by Mr. Bremner:

Q. You reside in Minneapolis?

A. Yes.

Q. Are you in the employ of the Minneapolis and St. Louis Railroad Company?

A. Yes.

Q. In what capacity?

A. Fireman.

Q. How long have you been in the employ of this company?

A. Four years and eight months.

Q. Do you recall the occasion of an accident resulting in the death of Mr. Nanos in May, 1912?

A. Yes, sir.

Q. You were the fireman on the switch engine that struck Mr. Nanos?

A. Yes, sir.

Q. How long had that switch engine been operating in that immediate vicinity just prior to the accident?

A. Oh, about an hour or one and a half hours, or some-
163 thing like that.

Q. Were you working on what is known as the lead track?

A. Most of the time, yes.

Q. Do you know where Mr. Nanos was struck?

A. Just about; I don't know exactly but just about.

Q. During your operations for an hour or one and a half hours prior to the accident had your engine gone by this spot?

A. Yes, sir; we had.

Q. Frequently?

A. Several times; I couldn't recall how many times.

Q. Do you recall the movement which was being made at the time Mr. Nanos was struck?

A. I remember we come out of track No. 1, and just before we left there I looked back, I couldn't see nothing on the track, I got down to put in the fire.

Q. Do you mean you were putting coal in the fire box?

A. Yes, sir; and as we pulled back I got my fire in, just about got it in when I noticed 95 go by us, I got up on the seat box and I saw the man rolling between the tracks, but I couldn't say who hit him.

Q. You saw him rolling between the tracks, your train and 95?

A. Yes.

Q. What did you do?

164 A. I hollered to the engineer to stop and he did; I went back to see who he was and got back on the engine again.

Q. Then he was put on the engine and taken down town?

A. Yes, sir.

Q. Mr. Connelly, it is customary and usual for the fireman to ring the bell?

A. It is as well as the engineer.

Q. Are you familiar with the custom that prevailed in that yard prior to the day on which Mr. Nanos was killed?

A. Yes, sir.

Q. What was the custom in respect to ringing the bell; is it customary to ring it all the time?

A. We were accustomed to ring it in case of emergency or for a crossing.

Q. Did you at any time see Mr. Nanos was near the lead track before this accident occurred?

A. No, sir; I didn't see him on the lead. When we pulled out on No. 1 I saw men working on the line of the northbound main track.

Q. Did you at any time see him on the lead track or near the lead track ahead of your engine?
A. No, sir; I did not.

Cross-examination.

By Mr. Leonard:

Q. You said you worked there about an hour or one and a half hours in that vicinity?
A. Yes.
Q. When you say "vicinity", how many blocks would you put that vicinity?
A. I don't know how many blocks that yard will take up.
165 Q. As much as seven or eight blocks?
A. I suppose it would if you counted all the tracks.
Q. How many tracks are there in that yard?
A. Fourteen or fifteen tracks.
Q. During that hour or hour and a half you were working on various tracks?
A. Yes, but we always had to pull out on that lead track in order to get the cars on the other tracks.
Q. Don't the other tracks run out from the other lead tracks?
A. The other tracks run on to this lead track, yes.
Q. Were you distributing the cars all the time?
A. That was our business, yes.
Q. If you had fifteen or twenty cars you wouldn't have to back on the lead in order to distribute on the various tracks?
A. You surely would.
Q. Then you were there a good deal during that one and a half hours?
A. Surely we did.
Q. Did you see any men working on the main track?
A. Yes.
Q. How many?
A. Eight or ten, I couldn't say for sure.
Q. What were they doing?
A. They were tamping ties.
Q. Were they pulling out any ties or putting in new ones?
166 A. No, I didn't see them doing that.
Q. Did you see any ties on each side of the track?
A. No.
Q. But you do recall being on that lead track several times?
A. Yes, sir.
Q. You say it is the custom to ring the bell in case of emergency?
A. Yes.
Q. Would you call a man standing with one foot inside of the track and the other foot outside of the track, would you call it an emergency?
A. Yes.
Q. How near would you have to be to him so as to call it an emergency?

A. Oh, a car length or two.
Q. So as to give him time to step out?
A. Yes.
Q. If a trackman was working on the tracks and close to your track, facing in the same direction as your engine was going, and he couldn't see your engine, and there was another freight train coming whistling and making a noise, would you give him any warning?
A. Yes.
Q. Greater vigilance would be required of you if there was a freight train coming in the opposite direction, wouldn't it?

Mr. Bremner: That is objected to.

Q. You would feel that a man was in greater danger
167 if he was facing southward and your train was going southward, and he couldn't see you, and there was another train coming towards you and his attention was centered on that train, would you call that an emergency?

Mr. Bremner: That is objected to as incompetent, irrelevant and immaterial.
The Court: Objection overruled.

A. Why, yes, if I thought we were going that far and going to hit him I would naturally call it a case of emergency.

Redirect examination.

By Mr. Bremner:

Q. In other words, you would consider it emergency if you saw a man on the track that you thought you were going to hit?
A. Yes, sir.

JOHN W. SANFORD, after being first duly sworn, testified as follows:

Examiner by Mr. Bremner:

Q. Mr. Sanford, you reside in Minneapolis?
A. Yes.
Q. You are in the employ of the Minneapolis and St. Louis Railroad Company as a switchman?
A. Yes.
Q. How long have you been employed in that capacity?
A. Four years.
Q. You were with the switch crew working under switch foreman Roberts on the day that Mr. Nanos was killed in 1912?
168 A. Yes.
Q. What was your position in the switch crew?
A. I was what they call a long field, on the rear end.
Q. What were you doing?
A. I was looking on the rear end to see they wouldn't run out of the yard.
Q. When did you first learn that the accident had occurred on that day?
A. Engineer Coolidge yelled to me.

Q. Where were you at the time?
A. I had just stepped off the rear of the train at that back yard switch.
Q. Prior to that time how long had your crew been working in this immediate vicinity?
A. Just about an hour or so after dinner.
Q. Had you gone there directly from dinner.
A. We had.
Q. What is your noon hour?
A. I forget whether an eight o'clock engine that day or seven o'clock.
Q. What time did you go to dinner?
A. Twelve o'clock.
Q. With an hour off?
A. Yes; we don't always get in at twelve o'clock.
Q. You don't know exactly what time you got there?
A. No.
Q. Had this switch engine in the course of that work in that vicinity one and a half hours or an hour prior to the time of this accident been working on this lead track which is immedi-
169 ately east of the northbound main?
A. Yes, we had been working there.
Q. And had you been working south of the switch leading to the back lead track?
A. We had.
Q. You say you were on the rear end or the north end of the train?
A. Yes.
Q. You didn't see the accident?
A. I did not.
Q. What did you do after Coolidge had called to you?
A. I run around the end of the train up towards the head end, towards the engine.
Q. Did you go up to where the accident occurred?
A. Yes, sir.
Q. Did you go down town with the engine?
A. I did.

Cross-examination.

By Mr. Leonard:

Q. Where was the end of your train when Coolidge hollered to you with reference to this switch stand in the lead track?
A. The last car had just stopped so I could throw that back yard switch.
Q. Were you off?
A. I was just off when Coolidge yelled to me.
Q. Where was Coolidge at that time?
A. He was in line with me.
Q. Going north?
170 A. Yes, in line with me going north.

JOSEPH MCFEETERS, after being first duly sworn, testified as follows:

Examined by Mr. Bremner:

Q. Mr. McFeeters, you reside in the city of Minneapolis?
A. Yes, sir.
Q. You are employed by the Minneapolis and St. Louis railroad as a switchman?
A. Yes.
Q. How long have you been employed in that capacity?
A. Two years.
Q. Were you a member of the crew under Roberts, the switch foreman, on the day that Nanos was killed?
A. Yes.
Q. What were your duties?
A. The man who followed the engines.
Q. What is his duties?
A. He throws switches and always keeps on the side of the engineer.
Q. Do you recall the time when Mr. Nanos was struck?
A. I do.
Q. Where had this engine and crew been working prior to the time he was struck?
A. Working on the lead at Kenwood.
Q. For how long?
A. An hour or an hour and a half, or something like that.
Q. When you say "the lead," is that the one east of the
171 main track?
A. Yes.
Q. Do you know approximately where Mr. Nanos was struck?
A. Just about.
Q. Had your engine been by that spot during the hour or hour and a half?
A. Yes, sir; several times.
Q. In making a move during the progress in which Mr. Nanos was struck where were you?
A. We went on No. 1 track after some cars and I got on the third car on the north end.
Q. Did you see the accident?
A. No, sir.
Q. You didn't see Mr. Nanos on the tracks before the accident?
A. I saw a gang of men working on the main line.
Q. Did you see Mr. Nanos on the lead track at any time?
A. I did not.
Q. Or near the lead track?
A. No; I saw them on the main line.

Mr. Leonard: No cross examination.

Mr. Bremner: Defendant now offers in evidence its Exhibit 3, being order for bond and letters of special administration signed by George R. Smith, Judge, in the matter of the estate of Gust Nanos, deceased. Defendant also offers in evidence defendant's Exhibit

4, being special administrator's bond, signed by John F. Bernhagen, the special administrator named in Exhibit 3, to-
172 gether with the approval of Judge George R. Smith endorsed thereon. Also defendant's Exhibit 5, being the oath of John F. Bernhagen as special administrator of the estate of Gust Nanos, decedent. Also defendant's Exhibit 6, being special letters of administration issued to John F. Bernhagen, Hennepin county, Minnesota, as special administrator of the estate of Gust Nanos, deceased.

Mr. Leonard: I understand the counsel that no written petition was filed in the Probate Court of Hennepin county by any person for the appointment of a special administrator, but that by the order for letters and the order appointing Mr. Bernhagen was issued without any written petition being on file for the appointment of a special administrator. Do you admit that?

Mr. Bremner: Yes, we have no objection to admitting that, sir.

Mr. Leonard: Then I object to all these exhibits—3, 4, 5 and 6—as being incompetent, irrelevant, immaterial and wholly void, and because it clearly appears from the evidence that the Probate Court which assumed to exercise jurisdiction of the estate has not acquired jurisdiction over the estate of the deceased.

The Court: This objection is made, as I understand, not because it is an irregular proceeding but because it is absolutely void?

Mr. Leonard: Yes, that is right.

The Court: I think I shall have to sustain the objection.

Mr. Bremner: I would ask to defer this matter until morn-
173 ing in order to give us an opportunity to investigate this question.

The Court: Very good.

Court adjourned.

Pursuant to adjournment the court convened at 10 A. M. May 1st, 1914.

Mr. Bremner: With the permission of the court I desire to modify that admission made yesterday to this effect: that we would admit that so far as the records in the Probate Court show that no written petition was filed prior to the appointment of the special administrator, and no written petition was among the papers handed to me by the counsel for the plaintiff in the case—that is as far as my personal knowledge on the subject goes—and in making this admission I make it subject to the objection, while that is the fact it is immaterial to any issue raised under the pleadings, and it is incompetent, it is an attempt to attack collaterally an order of the Probate Court. Do I have the court's consent to modify the admission?

The Court: Very good; proceed.

Argument made by counsel for the respective parties regarding the offer and admission of Exhibits 3, 4, 5 and 6 in evidence.

Recess 12 to 2 P. M.

The Court: Near the hour of adjournment yesterday evening an offer was made by the defendant to introduce defendant's Exhibits Nos. 3, 4, 5 and 6, and under the state of the evidence and the case at that time had an objection been made to the introduction of those exhibits the objection would have been overruled,
174 but upon the inquiry by the plaintiff's attorneys as to whether it was admitted that no petition had been filed in the Probate Court's office of this county for the appointment of a special administrator, and it being admitted in open court that no such petition had been filed, the court sustained the objection to the introduction of those exhibits; and thereupon, upon request of counsel for the defendant for permission to examine the authorities and be heard further upon the proposition upon the convening of court this morning, said permission was given, and the court adjourned for that purpose. On this morning when the court convened the attorney for the defendant appearing in open court, stated that he would like to change or modify the admission made yesterday as to the filing of a petition in the Probate Court, and stated that he would admit "that so far as the records in the Probate Court show that no written petition was filed prior to the appointment of the special administrator and no written petition was among the papers handed to me by counsel for the plaintiff in the case, and that is as far as my personal knowledge on the subject goes," and with this admission made in open court I cannot see that it changes the aspect of the case in any way, because it is clearly apparent to the court that no other conclusion can be reached than that no petition was ever filed with the Probate Court of this county prior to the appointment of the special administrator, and as I consider that a jurisdictional prerequisite to the appointment of any ad-
175 ministrator the objection to the introduction of defendant's exhibits, known as Nos. 3, 4, 5 and 6, is sustained.

Mr. Bremner: Save an exception for the defendant.

Mr. Bremner: This includes an overruling of my objection I take it?

The Court: Yes.

Mr. Bremner: Save an exception to that also.

F. M. MINER, after being first duly sworn, testified as follows:

Examined by Mr. Bremner:

Q. Mr. Miner, you are a resident of the city of Minneapolis?
A. I am.
Q. Your profession is what?
A. A lawyer.
Q. You are a member of the bar of this state?
A. I am.
Q. How long have you been a member of this bar?
A. I think it will be five years next August.
Q. How long have you been practicing law?
A. About thirty years.

Q. You are now the general attorney of the Minneapolis and St. Louis Railroad Company?
A. I am.
Q. How long have you held that position?
A. A little over a year.
Q. Prior to that time what was your position?
A. I was assistant to the general counsel of the road.
Q. How long did you occupy that position?
176 A. A little over a year.
Q. That would take you back to a little before the beginning of 1912?
A. Yes.

Mr. Bremner: Defendant now offers to prove by this witness that he conducted the final negotiations with John F. Bernhagen leading to a settlement of the claim of the estate of Gust Nanos, deceased, for the sum of seven hundred dollars; that John F. Bernhagen represented himself to be the special administrator of the estate of Gust Nanos, duly appointed by the Probate Court of Hennepin county, Minnesota; that the said John F. Bernhagen presented to him a certified copy of letters of administration issued by the Probate Court of Hennepin county, certified by the clerk, I think, of said Probate Court, appointing the said John F. Bernhagen special administrator of the estate of Gust Nanos, deceased; that we offer in connection with the examination of this witness to produce said certified copy of the letters of administration, have them identified by the reporter and offer them in evidence; that as a result of the final negotiations between John F. Bernhagen, so acting as the special administrator of the estate of Gust Nanos, deceased, and this witness a settlement was finally agreed upon in the sum of seven hundred dollars, which was to be paid by the Minneapolis and St. Louis Railroad Company in full of all claims and demands of every kind and nature of the estate of said Gust Nanos, deceased, against the said Minneapolis and St. Louis Railroad
177 Company growing out of the claimed wrongful killing of the said Gust Nanos; that in pursuance to said agreement a written agreement was prepared, putting in writing the said terms of settlement agreed upon between said John F. Bernhagen, so acting as special administrator, and this witness for and in behalf of the said Minneapolis and St. Louis Railroad Company, which agreement we offer to produce in connection with the examination of this witness, have it identified and offered in evidence. We further offer to prove by this witness that in accordance with the terms of the said agreement the Minneapolis and St. Louis Railroad Company did pay to John F. Bernhagen the said sum of seven hundred dollars in settlement of all claims of the estate of the said Gust Nanos; and we offer to produce and have identified by this witness and offered in evidence a voucher issued by the Minneapolis and St. Louis Railroad Company in favor of the said John F. Bernhagen, as special administrator of the said estate, in payment of the said claim. We further offer to prove by this witness that he had no

knowledge at the time of his dealings with the said John F. Bernhagen that no petition had been filed in the Probate Court of this county, asking for the appointment of a special administrator prior to the time of the letters of administration to the said John F. Bernhagen; that as far as his knowledge goes no other employe of the Minneapolis and St. Louis Railroad Company had any connection whatsoever with the appointment of John F. Bernhagen as special administrator; that his sole connection with such appoint-
178 ment was to suggest to the said Bernhagen and one Papadakis at one time prior to the making of the final settlement when he called at his office that before any settlement would be made it would be necessary that someone should be appointed administrator so that someone could deal with the company in authority. I further offer to prove by this witness that his first knowledge that no petition was filed prior to the appointment of the said John F. Bernhagen special administrator—and by "petition" I mean petition asking for the appointment of a special administrator by the Probate court of Hennepin county—was acquired within about the past two weeks. I further offer to prove by this witness that he has general charge of what may be called the personal injury litigation of the Minneapolis and St. Louis Railroad Company, and that if any repudiation of the settlement so made with the said John F. Bernhagen had been made by the present administrator to any officer of the company, it would have been the duty of such officer to impart such knowledge of said repudiation to him; that no notice of any repudiation by the present administrator of the settlement so made with John F. Bernhagen as special administrator has ever come to his knowledge; that no such notice was ever served upon him prior to the commencement of this action; and that the only notice that he has, and that so far as his knowledge goes the company has of any repudiation, was obtained first when the summons was served, if
179 that may be called a repudiation.

Mr. Leonard: That is objected to as incompetent, irrelevant, immaterial and not in issue in this case.

The Court: The objection will be sustained.

Mr. Bremner: Save an exception.

JOHN F. BERNHAGEN, after being first duly sworn, testified as follows:

Examined by Mr. Bremner:

Q. Mr. Bernhagen, you are a resident of the city of Minneapolis?
A. I am.
Q. How long have you lived here, John?
A. Since '93.
Q. And your profession?
A. A lawyer.
Q. How long have you been practicing law?
A. Eleven years.
Q. You are a member of the bar of this state?
A. I am.

Q. When were you admitted to practice?
A. I think in 1903.
Q. You are the same John F. Bernhagen that has been referred to here as having been appointed special administrator of the estate of Gust Nanos, deceased, by the Probate Court of Hennepin county?
A. I am.

Mr. Bremner: The defendant offers to prove by this witness that the first knowledge that he had that he had been appointed special administrator of the estate of Gust Nanos, deceased, came to
180 him through a notification from the Probate Court of Hennepin county to that effect on or about July 8th or 10th, 1912; that he did not ask the court for such an appointment and had no knowledge that he was to be appointed, after having had notification; that after receiving said appointment, after having had notice of said appointment he called upon Mr. S. J. Beardsley, the claims attorney of the Minneapolis and St. Louis Railroad Company, the defendant, and suggested a settlement; that the said Beardsley denied that there was any liability on the part of the company and he gave to him for his inspection the investigation file of the company; that he examined that investigation file and then left; that subsequently he called upon Mr. S. W. Patton, the claims agent of the Minneapolis and St. Louis Railroad Company, who also denied any liability, but offered to pay the sum of five hundred dollars, stating that it was customary for the company in some cases where there was no gross negligence on the part of the party killed and there was left surviving a widow and children, to pay something to cover the expenses that accrued and something additional; that the said Patton declined to raise the said amount about five hundred dollars; that afterwards Mr. Bernhagen, the witness, called upon Mr. F. M. Miner, then assistant to general counsel of the Minneapolis and St. Louis Railroad Company, and that there was with him on that visit Mr. Papadakis and another man whose name Mr. Bernhagen doesn't know, who was a Greek by nationality and couldn't speak the
181 English language, this Greek claiming to have been one of the laborers in this same gang of which Mr. Nanos was a member at the time of the accident which resulted in Mr. Nanos' death; that Mr. Miner stated to Mr. Bernhagen at that time that he didn't believe there was any liability and asked Mr. Bernhagen if he had made any investigation on his own account; that Mr. Bernhagen stated he had visited the place of the accident and had made an investigation, and that, using Mr. Papadakis as an interpreter, this Greek who was with them was asked to give his version of the accident and did give it, the translation being made by Mr. Papadakis; that Mr. Miner then asked him, Mr. Bernhagen, whether there was any substantial difference in the facts which he had found them to be in his investigation and as they were disclosed in the investigation by the railroad company, to which Mr. Bernhagen replied "No"; that Mr. Bernhagen insisted upon a settlement, first in the sum of fifteen hundred dollars and dropped to

ten hundred, and that the matter was finally compromised for seven hundred dollars; that either at that time or at a prior conference with Mr. Miner, Mr. Miner stated that it would be necessary to have someone appointed administrator in order that there might be someone with whom a settlement could be made; that so far as he knows that is the sole connection which Mr. Miner had with the appointment of any administrator; that after Mr. Bernhagen had been appointed special administrator, as hereinbefore set
182 out, he did enter into a written agreement of settlement with Mr. Miner, representing the railroad company, and Mr. Bernhagen acting as special administrator for the estate of Gust Nanos, deceased, agreeing to settle the claim of the estate of Gust Nanos, deceased, against the Minneapolis and St. Louis Railroad Company for the sum of seven hundred dollars; that pursuant to said settlement agreement the said sum of seven hundred dollars was subsequently paid to him, John F. Bernhagen, by the Minneapolis and St. Louis Railroad Company, and was by him, the witness, received in full settlement of all claims of Gust Nanos against the said railroad company for the claimed damages on account of the wrongful killing of the said Gust Nanos; that the said sum of seven hundred dollars is still in the possession of the witness; that in addition to the said seven hundred dollars the witness, as special administrator of the estate of Gust Nanos, deceased, collected from the Minneapolis and St. Louis Railroad Company the sum of thirty-one dollar and sixty seven cents, the amount due to the said Gust Nanos at the time of his death as wages; that he still retains in his possession the amount so collected as special administrator; that the settlement above referred to was made and the money paid August 16th, 1912; that subsequently to the time said settlement was made Mr. Leonard, who now represents the plaintiff in this action, called Mr. Bernhagen over the telephone, told him that he was interested in the claim, and that Mr. Bernhagen stated to Mr.
183 Leonard over the telephone that the claim had been settled; that Mr. Leonard then stated he was going to have a special administrator appointed, and that Mr. Bernhagen then stated to him that he would turn over this money to the administrator as soon as he was appointed; that about the 2nd day of December, 1912, he, the witness, called upon Judge George R. Smith, then judge of the Probate Court of Hennepin county, Minnesota, and asked him what he should do with these funds that he had in his hands as special administrator, and the court advised him to hold said funds until the final deposition of this matter; that on the same day he met Mr. Leonard, attorney for the plaintiff in this action, and again offered to file a report and turn these funds in his possession over to the general administrator, but that Mr. Leonard declined to have anything to do with it; and the said witness renews his offer at the present time to turn over to the estate all the funds acquired by him as special administrator, that he has been willing at all times to turn over said funds to the general administrator or to the court.

Mr. Leonard: That is objected to as incompetent, irrelevant and immaterial under the issues.

The Court: Objection sustained.
Mr. Bremner: Exception.

JAMES E. PATTERSON, after being first duly sworn testified as follows:

Examined by Mr. Bremner:

Q. Mr. Patterson, you reside in Minneapolis?
A. Yes, sir.
184 Q. How long have you lived here?
A. Since 1908.
Q. Your occupation?
A. Attorney.
Q. And you are a member of what firm?
A. McDonald and Patterson at present.
Q. How long have you been a member of the bar of Minnesota?
A. It will be three years in June.

Mr. Bremner: The defendant offers to prove by this witness that on or about the 8th day of July, 1912, in company with Mr. Papadakis, he calling upon Judge George R. Smith, then the judge of the Probate Court of Hennepin county, Minnesota, and met the judge in his chambers, talked with him in reference to the death of Gust Nanos, and stated to him among other things that the widow and children of the deceased were in Greece, and that so far as he was advised there were no relatives in the county of Hennepin, that he explained in so far as he knew the facts in reference to the matter in which Mr. Nanos had met his death, and advised that the court or asked the court what was best to be done; the court suggested the appointment of a special administrator; Mr. Patterson suggested the appointment of Mr. Papadakis, also Mr. Forchas; the court declined to appoint either of those, but stated that he would appoint Mr. Bernhagen whom he knew well; that the witness asked Judge Smith whether he should file a petition asking for the appointment of a special administrator, and that Judge Smith replied that it would not be necessary.

185 Mr. Leonard: That is objected to as incompetent, irrelevant and immaterial.
The Court: Objection sustained.
Mr. Bremner: Exception.
Mr. Bremner: Defendant now renews its offer of Exhibits 3, 4, 5 and 6.
Mr. Leonard: That is objected to as incompetent, irrelevant, immaterial and not in issue.
The Court: Objection sustained.
Mr. Bremner: Exception.

Mr. Bremner: Defendant rests.

Testimony closed.

Mr. Bremner: The defendant now renews the motions to dismiss made by it at the conclusion of the plaintiff's testimony and at the

conclusion of the testimony of the first witness examined, Mr. Bombolis, upon all the grounds set forth in said motions, and upon each and every ground therein set forth.

The Court: Motion denied.

Mr. Bremner: Exception.

Mr. Bremner: Defendant now moves the court to instruct the jury to return a verdict for the defendant on each and every ground set forth in the motions to dismiss referred to in the preceding motion, and upon the further ground that it now clearly appears from the evidence that the plaintiff's intestate, Constantine or Gust Nanos, assumed the risk of the happening of the accident which resulted in the injuries which caused his death, and that the said acci-
186 dent was due to one of the ordinary risks of his employment.

Mr. Leonard: That is objected to as incompetent, irrelevant and immaterial.

The Court: Motion denied.

Mr. Bremner: Exception.

Mr. Bremner: And upon the further ground that the evidence shows that the accident was due to the sole negligence of the plaintiff's intestate, and that the negligence of the plaintiff's intestate was the proximate cause of the accident which resulted in the injuries which caused his death.

Mr. Leonard: That is objected to as incompetent, irrelevant and immaterial.

The Court: Motion denied.

Mr. Bremner: Exception.

Charge.

By the Court:

GENTLEMEN OF THE JURY: On the 22nd day of May, 1912, in this city, a man named Constantine Nanos, who was also known as Gust Nanos, was in the employ of the Minneapolis and St. Louis Railroad Company, and upon that day while at work for the company he was struck by a switch engine of the company and sustained injuries which caused his death shortly afterward.

At the time of his accidental death the Minneapolis and St. Louis Railroad Company was an admitted common carrier carrying passengers and freight at fixed and established rates and engaged in interstate commerce, that is it was carrying and transporting
187 passengers and freight from this state into Iowa and from Iowa into this state, and with reference to such a common carrier an Act of Congress, so far as it is applicable to this case, provides:

"That every common carrier by railroad while engaging in commerce between any of the several states * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employe, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employe."

At his death Constantine or Gust Nanos left surviving him a widow

and three children, and one George Bombolis having been appointed administrator of his estate by the Probate Court of this county, such administrator, under Act of Congress just mentioned, commenced and is prosecuting this action against the Minneapolis and St. Louis Railroad Company to recover damages for the benefit of the surviving widow and children of the said Nanos, whose death he claims was caused by the negligence of the railroad company.

Now, gentlemen, it is admitted by the parties here in court that upon the day in question Nanos was in the employ of and at work for the Minneapolis and St. Louis Railroad Company, that the company was engaged in interstate commerce, that he was struck by an engine of the company and sustained injuries which caused his death in a very short time, and that if the company is liable
188 at all in damages for his death it is under the provisions of the Act of Congress heretofore referred to.

And, gentlemen, the particular allegation, the specific charge of negligence which the plaintiff makes against the railroad company to hold it responsible for and answerable in damages is that, while Nanos, with other men, was at work along the tracks of the company in what is known as the "Kenwood yards," and at a place where there are three parallel tracks—his particular work being with the assistance of another man, to take out old ties and place new ones under the rails of the middle track—had just taken out an old tie and with his helper was in the act of turning the tie around to place it upon the ground between and parallel with the middle and east or lead track, and as a freight train was just passing going north and towards the city on the middle track, the railroad company carelessly and negligently, without any warning or signal by the ringing of the bell or otherwise, caused an engine drawing a number of cars to pass in an opposite direction to that in which the freight train was going and upon the parallel track between which and the middle track Nanos was working and to strike him and inflict the injuries which caused his death.

On the contrary the defendant railroad company denies that the death of Nanos was caused by any negligence on its part, and in further defense claims that the injuries received by Nanos were the result of the ordinary risks of the business then being con-
189 ducted and carried on and constituted one of the risks assumed by Nanos in the work he was doing when the accident happened, and further claims that the injuries sustained by Nanos were due solely to a failure on his part to use ordinary care to avoid them and that his own negligence was one of the proximate and contributing causes of the accident and resultant injuries.

Such in substance, gentlemen, are the claims of the parties, plaintiff and defendant, in this action, as set forth in their pleadings and as contended for here in court, but I shall not attempt to quote, much less comment upon the evidence which each has introduced and which it is claimed supports and proves their respective contentions.

But it is for you, gentlemen, to remember, consider, analyze and weigh all the evidence in the case, both that for the plaintiff and

that for the defendant, to reconcile it, if possible, where it conflicts, to harmonize it, if possible, where it differs and to sift out of it all the truth, and decide where equity, where justice is, between the parties.

Now, gentlemen, you are the sole and exclusive judges of the facts in the case, it is for you to say what has been and what has not been proved, and it is for you to attach such weight to the evidence as you think it should have, and it is for you to judge of the credibility of the witnesses.

And in making your tests in that regard you should take into consideration their appearance upon the witness stand; their manner of testifying; their candor or lack of candor, if any is shown; their bias or prejudice, if you noticed any; the interest, if any, they
190 may have in the result of this lawsuit; the probability or improbability of the story they tell; the opportunity they have had of knowing what they are testifying about, and all of the facts and circumstances in connection with their tesitmony, and give to it just such weight as you think it deserves. And if you find that any witness has wilfully and knowingly testified falsely as to any material fact at issue, then you are at liberty to disregard the entire testimony of that witness except in so far as you find it to be corroborated by other material and competent testimony in the case.

You should not take any statement of counsel, either for the plaintiff or defendant, as to what has been or has not been proved, unless you find that such statement coincides and accords with your recollection of it, because, as I have stated, it is for you to decide what facts have been and what facts have not been established by the evidence.

Nor should you take into consideration any ruling the court has made during the progress of the trial, or anything that has been said in this charge to you, as indicating in any way any opinion the court has or may entertain in regard to the merits of this controversy, or as to which of these parties, the plaintiff or the defendant, should have a verdict at your hands, for nothing of that kind has been intended.

And, gentlemen, from the pleadings and claims advanced by the parties you can see that the relation existing between Nanos
191 and the railroad company at the time of the accident was that of master and servant, Nanos being the servant in the employ of the master, the defendant railroad company. And it is claimed by the plaintiff that the defendant was negligent in the discharge of its duty as master, and that because thereof Nanos met with the accident which caused his death. In other words, this action is based upon the alleged negligence of the master, the railroad company.

And, gentlemen, you must understand that simply because an accident has happened resulting in injury or death that therefore someone is responsible in damages, for accidents of the most serious character are of frequent occurrence where no one is to blame and no damages can be recovered, and accidental injuries may occur where both parties are to blame and neither is liable in damages to the other.

And, therefore, gentlemen, when a person charges another with negligence and brings him into court to answer to such charge he cannot recover damages unless he proves his charge, and, therefore, in this case it is incumbent upon, the burden of proof is upon the plaintiff to prove all the material and essential allegations of his complaint by a fair preponderance of all the evidence in the case and that the charge of negligence was the natural and proximate cause of the accident and the resultant death before he is entitled to a verdict, and failing to so prove the charged negligence he must fail in this action.

192 Now, negligence in law, gentlemen, may, for the purposes of this case, be defined as follows: It is the failure to use that care and precaution which the ordinarily prudent person would use in the same or a similar situation. And, gentlemen, negligence is never presumed, but the presumption is that every one in what they do uses due care until the contrary is shown by satisfactory proof, and due care means what is called ordinary care. And whether a person has exercised ordinary care in a certain situation is to be determined from all the facts and circumstances connected with and surrounding the situation and its conditions.

In determining the question, the situation of affairs at the time is to be considered, as well as the liability to danger, the nature, character and extent of the danger, and the more or less disastrous consequences that might be expected to result from a want of care. In each case, in each situation the care to be observed must be commensurate with the risks of the situation. This failure to use ordinary care may consist in doing something which a person of ordinary prudence would not do under the same or similar circumstances, or it may consist in a failure or omission to do something that a person of ordinary prudence would do under like circumstances. And these principles, gentlemen, are to be applied by you in determining the question whether or not the defendant railroad company was negligent in respect to the way in which it run, operated and managed the switch engine on the lead track at the time it struck and killed Nanos.

193 As I have said, the relation of master and servant existed between the defendant and Nanos at the time of the accident, and while the master is not the insurer of the servant's safety and cannot be required to guarantee him absolute safety from harm when at work, it is nevertheless the general duty of the master to exercise ordinary care to prevent the exposure of his employes to unnecessary and unreasonable risk, and among other duties, the master is bound to use ordinary care in furnishing the servant with a reasonably safe place in which to do his work, and this duty is a continuing one, that is he must keep and maintain the servant's place of work at all times when he is engaged at work in a reasonably safe condition for him to work in. In the present case the defendant is a corporation, and as a corporation can act only by and through natural persons as its agents or representatives, and as certain persons at the time in question, namely May 22nd, 1912, were the agents of the defendant company, it follows and you are so instructed that

what they did or omitted to do, so far as their acts or omissions related to this accident, were the acts and omissions of the defendant company, and the question here is, on this branch of the case, whether or not the defendant's employe, Coolidge, the engineer in charge of and running the engine in question, exercised ordinary care in what he did or omitted to do, or whether he was negligent in running, operating and managing the engine which struck and killed Nanos.

And gentlemen, if you find from the evidence that it was
194 the custom of the defendant to give cautionary signals of the approach of switching engines by the ringing of the bell, then you are instructed that under the circumstances in this case, if you further find from the evidence that such cautionary signal was in this instance omitted, it is for you to determine whether such omission was negligence on the part of the defendant company.

And, if you find from the evidence that it was customary for the defendant's servants to give a cautionary signal of the approach of switching engines, under the circumstances in this case, then the deceased had a right to rely on its giving such cautionary signal, instead of keeping a constant lookout for himself.

And, if you find from the evidence that the deceased was engrossed in his work, and you further find that it was the custom of the defendant to give a cautionary signal of the approach of switch engines, under the circumstances in this case, then you are instructed that the defendant owed the decedent the duty of active vigilance in giving him proper signals of the approach of trains, and you are further instructed that an employe engrossed in work, if you find that the deceased was engrossed in work, — to rely on customary signals, and is not bound to anticipate negligence on the master's part in failing to give them.

And, whatever you may find from all the evidence in the case as to there being a custom to give a cautionary signal of the approach of switching engines to men on working tracks, it is
195 for you to determine from all the evidence in this case, whether the person or persons managing the switch engine, if they had been exercising proper care, would not have discovered that the noise made by the other train, the freight train on the parallel track, prevented the deceased from hearing this train, and that he was in a perilous position, which made it their duty to give him some proper signal to warn him of its approach.

Now, gentlemen, as to all of these matters you have heard the testimony and it is not necessary for me to call your particular attention to it or to dwell upon it, but you should consider it fully, carefully, conscientiously, and if you find that the engineer at the time and place in question, in running, operating and managing the engine acted as an ordinarily prudent man would have acted under like circumstances, then there was no negligence on the part of the engineer, and no negligence on the part of the defendant company. If you so find you will not give the case any further consideration but you should return a verdict for the defendant. Or if you find the evidence equally balanced as to whether or not the

engineer was negligent in running, operating and managing the switch engine, you should decide the issue in favor of and return a verdict for the defendant company. But if you find by a fair preponderance of all the evidence that the engineer in what he did or omitted to do in the running, operating and managing of the engine, failed to act as an ordinarily prudent man would have acted under the same or similar circumstances, then he was
196 negligent, and you should so find, and then you will proceed to take up and consider certain other questions to which I shall now call your attention.

It is claimed by the defendant that this accident happened, that this death was the result of risks which Nanos had assumed, and that therefore the plaintiff cannot recover in this action, and the further claim is made that Nanos was guilty of negligence himself which contributed to and caused the accident.

As to the first claim, assumption of risk, you are instructed that a servant assumes the ordinary risks of his employment and such as are reasonably and necessarily incident to such employment, and such were the risks assumed by Nanos in the employment in which he was engaged. Ordinarily also, the servant assumes the negligence of a fellow servant, but in this case, brought under the Federal Employers' Liability Act, involving railroad work and railroad hazards, Nanos did not assume the risk of negligence on the part of the engineer of the switch engine.

And as to the assumption of risk, it will be necessary for you to consider the acts of Nanos and all of the surrounding circumstances connected with the accident; the place where the work was being done; the frequent passing to and fro of the switch engine which he could see; the passing of trains on the track next to the switch track, which he could also see, when it was necessary for the men, including Nanos, to get off the main track as well as off
197 the lead track; the width of the space between the main track and switch track for the men to stand in should they see fit to stand there when trains passed in opposite directions on the two tracks. These and all other facts and circumstances having any bearing on the question of the assumption of risk should be carefully weighed by you in determining this question. And if you find from the evidence that the accident was caused not by the negligence of the engineer, but by and the result of the ordinary risks reasonably and necessarily incident to the work in which Nanos was engaged, then the defendant would not be liable in this action, and your verdict should be for the defendant.

As to the question of contributory negligence the Federal Employers' Liability Act from which I have heretofore quoted provides, so far as this case is concerned, that "In all actions hereafter brought against any such common carrier by railroad, under or by virtue of any of the provisions of this Act to recover damages for personal injuries to the employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar his recovery, but the damages shall be diminished by the jury in proportion to the

amount of negligence attributable to such employee." Thus you will see, gentlemen, that though an employe may be, when injured by an accident, guilty of contributory negligence that does not bar his right of recovery, but his damages, if any, shall be diminished by the jury in proportion to the amount of negligence at-
198 tributable to such employe.

To enable you, gentlemen, to determine whether Nanos was guilty of contributory negligence, you are instructed that you should apply the same test given you to determine whether the engineer was negligent, namely: Did Nanos use ordinary care at the time in question, in view of all the facts and circumstances as they then existed?

To determine this question, you should consider the age of Nanos, his experience in that class of work, the kind of work he was doing, the place where he was working, the way he went when the freight engine whistled, the opportunity he had for avoiding danger by watching and looking for passing trains on both tracks, and all of the surrounding circumstances with respect to the accident to enable you to decide whether he exercised such care as an ordinarily prudent man would exercise under the same or similar circumstances. If he failed to exercise that care then he was guilty of negligence, and if that negligence proximately contributed in some degree to the accident, you should so find upon that issue.

The burden of proof, however, gentlemen, to show contributory negligence on the part of Nanos is on the defendant company, and such negligence must be shown—must be made to appear by a fair preponderance of the evidence. But in determining whether or not it does so appear it is your duty to consider all of the testimony in the case bearing upon the question, both that on behalf of the plaintiff and that on behalf of the defendant, and if you
199 are convinced by a fair preponderance of the evidence that he himself was guilty of negligence contributing to the accident and his death, you should so find.

Now, if you find from the evidence and under these instructions that the plaintiff is entitled to a verdict, you will next consider the amount of damages, if any, you will allow.

As to the question of damages, gentlemen, the court can give you no hard and fast rule for your guidance, but I will say that in a case of this nature and character the value to the surviving beneficiaries—the loss resulting from the death of the one whose life was taken—constitutes the ground and the measure of the recovery, and while the law presumes that the life of the deceased was of some pecuniary value to those who were entitled to receive the benefits of it, the amount of damages, if any, to be awarded and recovered must be left to the sound judgment of the jury, and the assessment of damages, if any, must be based upon the reasonable expectation of substantial advantages and benefits which the surviving beneficiaries would have received from the life of the deceased had that life continued.

And further, gentlemen, in awarding damages, if any, you should remember that they must be awarded solely and only by way of

compensation for pecuniary loss to Mrs. Nanos and her children, that is, for a loss to them measured in dollars and cents. No amount of money can be awarded for grief or mental suffering or for
200 injuries to affections and sentiments on the part of the beneficiaries, Mrs. Nanos and her children, or for their loss of the society, companionship and comfort of the deceased husband and father.

But the true test for your guidance in awarding damages, if you find that any should be awarded, is, what in view of all the facts and circumstances as disclosed by the evidence was the probable pecuniary interest of the beneficiaries, Mrs. Nanos and her children, in the continuance of the life of the deceased, Gust Nanos, at the time of whose death Mrs. Nanos was 33 years of age, Katherine Nanos was 8 years of age, Stavroula Nanos was 5 years of age, and Argerios was one year of age, and all of whom were living together?

And in making your estimate of damages, if any, you can consider and take into account the amount which he probably would have earned during his life for the benefit of his wife and children, taking into account the age, the health, the physical condition, his ability and disposition to work, his habits of living and expenditures, and the probable duration of the life of the deceased, who at the time of his death was 38 years of age.

And, gentlemen, in awarding damages, if any, it will be your duty to apportion the damages between the widow and the three minor children, fixing the amount each is entitled to respectively. And in fixing the amount of damages, if any, for the widow, you should consider what pecuniary loss, if any, she sustained by reason of her loss of support which the deceased owed her; the
201 amount which the deceased would probably have accumulated and which she might reasonably have expected to inherit, and the damages of the widow should be calculated upon the basis of the joint lives of the widow and the deceased.

And in determining the amount of damages, if any, for each of the children respectively, you should take into consideration their pecuniary damage, if any, resulting from their loss of support, as well as for the damages, if any, resulting from whatever loss there may be of the benefit of education, and the enjoyment of greater comforts and conveniences, if any, of life, as well as for the loss of personal care, training and instruction of their father. Also the damages, if any, in prospective benefits, taking into consideration the amount which the deceased would probably have accumulated, and which the children might reasonably have expected to inherit.

And, gentlemen, the damages, if any, to the minor children, for the loss of support as to each child, should be confined and limited to his or her minority, they being of the following ages at the time of the death of their father: Katherine, 8; Stavroula, 5, and Angerios one.

And, gentlemen, if you find that the accident was caused in part by the negligence of the engineer of the switch engine and in part by the negligence of Nanos himself, you should then diminish, that is you should reduce the amount of damage to which the plaintiff

would be entitled, in proportion to the amount of negligence
202 attributable to Nanos himself. That is, you will first determine from the evidence the entire amount of damage occasioned by the death of Nanos, without regard to his negligence, and then if you find that he was guilty of negligence you will determine in what proportion his negligence contributed to produce his death, and as you find that proportion by the testimony, you will reduce the amount of the plaintiff's recovery accordingly, and apportion the balance, if any, among the widow and the three children in such amount to each as you may determine upon.

Now, gentlemen of the jury, the case will be left with you; it is an important case; treat this plaintiff fairly and the defendant justly, and return a verdict without bias or prejudice, fear, sympathy or favor. Do not return a verdict against the defendant because it is a corporation, because a corporation has just the same rights in a court of justice as an individual; and do not return a verdict for the plaintiff because he is representing a widow and children, but be fair to each, and from the evidence and under these instructions render just such a verdict as you are satisfied you should return under your oaths as sworn jurors, as good citizens, as good men, and such a verdict as you will hereafter feel was right and just in this case.

Gentlemen of the jury, when you retire to your room you will select one of your number as foreman, and as you leave the room the clerk will hand you four forms of verdict. One of which will read: "We, the jury in the above entitled action, find for
203 the plaintiff and against the defendant and assess his damages in the sum of"—blank—"Dollars",—and if you agree upon that verdict please write in the amount and also put after the dollar mark the amount in figures—"and we apportion said damages as follows, to-wit: To Vagelio Nanos, surviving widow of the deceased, the sum of"—blank—"dollars"—write out the amount, also fill the amount in figures after the dollar mark. "To Katherine Nanos, daughter of the deceased, the sum of"—blank—"dollars"—write out the amount and fill the amount in figures after the dollar mark. "To Stavroula Nanos, daughter of the deceased, the sum of"—blank—"dollars"—write out the amount and fill the amount in figures after the dollar mark. "To Argerios Nanos, son of the deceased, the sum of"—blank—"dollars"—write out the amount, also fill the amount in figures after the dollar mark. If you agree upon that verdict unanimously you will fill in the amounts in the proper places, have your foreman sign and date it and return with it into this room. On the contrary, if you find for the defendant unanimously, your verdict will be: "We, the jury in the above entitled action, find for the defendant," have your foreman sign that verdict and date it and then return with it into this room. If, however, after twelve hours' deliberation you fail to find a verdict unanimously, then under the law you can find what is called a five-sixths verdict, that is ten or eleven of your number can return a verdict in favor of the plaintiff or in favor of the defendant, and if
204 you should do that you will find similar forms as I have directed your attention to. But each one of you who concur

in either verdict, if you agree upon it, will sign your names opposite the numbers and fill in the date, and it will not be necessary for your foreman to sign that verdict as such. The twelve hours will commence to run from the time the officer takes you in charge, and when you have agreed upon a verdict return with it into this room.

Defendant's Request to Charge Refused by the Court.

1. The evidence in this case, which is uncontradicted, shows that the widow and children of the decedent for whose benefit this action is brought under the Act of Congress of April 22nd, 1908, as amended by the Act of Congress of April 5th, 1910, commonly known as the Federal Employers' Liability Act, are non-resident aliens, being citizens of and residents in Greece, and therefore they have no right under the said Act of Congress for which this suit may be maintained, and you are therefore directed to render a verdict in favor of the defendant.

2. The complaint charges that at the time the plaintiff's intestate was engaged in the act of removing ties from a track of the defendant company, it became necessary to remove certain ties then lying upon said track before a train then coming towards the station of the defendant company in the city of Minneapolis, along said track, could or would strike said ties if they were allowed to remain
205 on said track, and that while the said decedent was in the act of so removing said ties from said track, the defendant so negligently and carelessly operated an engine and train on an adjoining track without any warning or notice whatever to the said decedent, that such other engine on the said adjoining track came into collision with the said decedent while he was in the act of so removing said ties from the main track of the defendant company. You are instructed that this is the only claim of negligence on the part of the defendant company set forth in the complaint, and that before the plaintiff can recover you must find from a fair preponderance of the evidence that at the time he was struck he was engaged in the act of removing a tie or ties from the main track of the defendant company; and even though you should find that the engine of the defendant company on the adjoining track was operated in a negligent manner, in that no warning of its approach was given, yet the plaintiff cannot recover except under the allegations of his complaint; and if you should find from a fair preponderance of the evidence that the plaintiff, at the time he was struck, was not engaged in removing a tie or ties from the main track of the defendant company, then your verdict must be for the defendant.

206 STATE OF MINNESOTA,
County of Hennepin:

District Court, 4th Judicial District.

GEORGE BOMBOLIS, as Administrator of the Estate of Constantine Nanos, alias Gust Nanos, Deceased, Plaintiff,
vs.
MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, Defendant.

Verdict.

We, the jury in the above entitled action, find for the plaintiff and against the defendant, and assess his damages in the sum of three thousand seven hundred fifty dollars ($3,750.00). And we apportion said damages as follows, to-wit: To Vagelio Nanos, surviving widow of the deceased, the sum of twelve hundred fifty dollars ($1,250.00); to Katherine Nanos, daughter of the deceased, the sum of six hundred dollars ($600.00); to Stavroula Nanos, daughter of the deceased, the sum of nine hundred dollars ($900.00); to Argerious Nanos, son of the deceased, the sum of one thousand dollars $1,000.00.

Dated May 1st, 1914.

M. J. GREINER, *Foreman.*

STATE OF MINNESOTA,
County of Hennepin:

District Court, 4th Judicial District.

GEORGE BOMBOLIS, as Administrator of the Estate of Constantine Nanos, alias Gust Nanos, Deceased, Plaintiff,
vs.
MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, Defendant.

Notice of Proposed Settled Case.

To George B. Leonard, attorney for plaintiff:

You will please take notice, that the foregoing transcript consisting of 169 pages of typewritten matter is proposed by the defendant as the case to be settled and allowed by the Honorable Charles S. Jelley, the judge who tried this cause, and that the said proposed case will be presented by the defendant to the said judge in his chambers in the court house in the city of Minneapolis, Hennepin county, on the 6th day of June, 1914, at ten o'clock A. M., or as soon
207 thereafter as counsel can be heard for settlement and allowance.

W. H. BREMNER,
F. M. MINER,
Attorneys for Defendant.

Due and personal service of the foregoing proposed settled case, and of the foregoing notice in relation thereto is hereby admitted at Minneapolis, Minnesota, this 27th day of May, 1913.

GEO. B. LEONARD,
Attorney for Plaintiff.

STATE OF MINNESOTA,
County of Hennepin:

District Court, 4th Judicial District.

GEORGE BOMBOLIS, as Administrator of the Estate of Constantine Nanos, alias Gust Nanos, Deceased, Plaintiff,
vs.
MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, Defendant.

Stipulation Settling Case.

It is hereby stipulated by and between the parties hereto that the foregoing proposed case, as amended, the parties having agreed that plaintiff's proposed amendments all be allowed excepting proposed amendments Nos. 2 and 19, consisting of 169 pages of typewritten matter, containing all the evidence offered or introduced, all rulings, orders and objections and other proceedings on the trial of said case, and that the same is correct and, together with the verdict as rendered, is hereby constituted a settled case herein, and the same may be settled and allowed as the settled case herein by the Honorable Charles S. Jelly without notice.

It is further stipulated and agreed that all of the exhibits referred to in the settled case, together with the verdict as rendered, are part thereof and shall be by the clerk of the District Court transmitted to the clerk of the Supreme Court on appeal.

208

Dated this 26th day of May, 1914.

GEO. B. LEONARD,
Attorney for Plaintiff.
W. H. BREMNER,
F. M. MINER,
Attorneys for Defendant.

STATE OF MINNESOTA,
County of Hennepin:

District Court, 4th Judicial District.

GEORGE BOMBOLIS, as Administrator of the Estate of Constantine Nanos, alias Gust Nanos, Deceased, Plaintiff,
vs.
MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, Defendant.

Certificate Settling Case.

I hereby certify that the foregoing case, consisting of 169 pages of typewritten matter, has been examined by me and found conformable

to the truth and to contain all the evidence offered or introduced on the trial of this cause, the charge in full and all objections, rulings, orders and all other proceedings of said trial, and I hereby settle and allow the same as the settled case herein.

All exhibits offered or received in said cause, and the verdict as rendered, may be considered as a part of the settled case the same as if included herein.

Dated this 6th day of June, 1914.

CHARLES S. JELLEY, *Judge.*

209 STATE OF MINNESOTA,
County of Hennepin:

District Court, 4th Judicial District.

GEORGE BOMBELIS, as Administrator of the Estate of Constantine Nanos, alias Gust Nanos, Deceased, Plaintiff,
vs.
MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, Defendant.

Notice for Judgment Notwithstanding the Verdict or for New Trial.

To George B. Leonard, attorney for plaintiff:

Take notice that on the case settled herein, the defendant will move the court at its chambers in the court house, in the city of Minneapolis, Hennepin county, on the 6th day of June, 1914, at ten o'clock A. M., or as soon thereafter as counsel can be heard for an order for judgment in its behalf notwithstanding the verdict on the ground that the court erred in denying its motion for a directed verdict made at the close of all the testimony, and if that be denied for an order setting aside the verdict herein and granting a new trial with costs on the following grounds:

1. That the verdict is not justified by the evidence and is contrary to law.

2. That the court erred in denying defendant's motion at the close of plaintiff's testimony to dismiss the action.

3. That the court erred in denying defendant's motion upon the first ground thereof, to-wit:

"Upon the whole case thus far made the plaintiff is not entitled to recover."

4. That the court erred in denying defendant's motion upon the second ground thereof, to-wit:

"That plaintiff has failed to show that the defendant or any of its employes was guilty of any negligence which causes or contributed to the accident which resulted in the death of the plaintiff's intestate."

210 5. That the court erred in denying defendant's motion upon the third ground thereof, to-wit:

"That the undisputed evidence shows that the plaintiff's intestate was himself guilty of negligence, which was the proximate cause of the accident which resulted in his death."

6. That the court erred in denying defendant's motion upon the fourth ground thereof, to-wit:

"That under the pleadings in this case the plaintiff is not entitled to recover."

7. That the court erred in denying defendant's motion upon the fifth ground thereof, to-wit:

"That the reply admits that a settlement was made between John F. Bernhagen, special administrator of the estate of Gust Nanos, deceased; that is to say that the defendant and John F. Bernhagen, as special administrator of said estate, did settle all claims of the estate of Gust Nanos against the defendant for and on account of the claim of the wrongful killing of the plaintiff's intestate in the sum of seven hundred dollars. No evidence has been offered tending to impeach or in any way nullify that admitted settlement."

8. That the court erred in denying defendant's motion upon the sixth ground thereof, to-wit:

"For the reason that there is a fatal variance between the proof in this case and the cause of action alleged in the complaint.

9. That the court erred in denying defendant's motion upon the seventh ground thereof, to-wit:

"For the reasons stated in the motion to dismiss heretofore
211 made, to-wit; that this action is brought under the terms of the statute of the United States, known as the "Federal Employers' Liability Act,' and it appears that the sole beneficiaries of the action are non-resident aliens, and that non-resident aliens are not entitled to recover under the provisions of said law."

10. That the court errer in denying defendant's motion upon the eighth ground thereof, to-wit:

"That no proof has been offered tending to show any financial loss to the persons for whose benefit this action is brought; that is to say, no proof has been offered that the plaintiff's intestate contributed to the support or had been contributing to the support of those for whose benefit this action is brought prior to his death."

11. That the court erred in excluding Exhibit 3 being order for bond and letters of special administration signed by George R. Smith, Judge, in the matter of the estate of Gust Nanos, deceased.

12. That the court erred in excluding Exhibit 4, being special administrator's bond, signed by John F. Bernhagen, the special administrator named in Exhibit 3, together with the approval of Judge George R. Smith endorsed thereon.

13. That the court erred in excluding Exhibit 5, being the oath of John F. Bernhagen as special administrator of the estate of Gust Nanos, decedent.

14. That the court erred in excluding Exhibit 6, being special letters of administration issued to John F. Bernhagen, Hen-
212 nepin county, Minnesota, as special administrator of the estate of Gust Nanos, deceased.

15. That the court erred in excluding the testimony of F. M. Miner as to the facts offered to be proved by the testimony of said witness.

16. That the court erred in excluding the testimony of John F. Bernhagen as to the facts offered to be proved by said witness.

17. That the court erred in excluding the testimony of James E. Patterson as to the facts offered to be proved by said witness.

18. That the court erred in denying defendant's motion to dismiss said cause, which motion was renewed at the close of all the testimony and as heretofore set forth in subdivisions, 3, 4, 5, 6, 7, 8, 9 and 10 hereof.

19. That the court erred in denying defendant's motion to instruct the jury to return a verdict for the defendant upon each of the grounds set forth in its motion to dismiss.

20. That the court erred in denying defendant's motion to instruct the jury to return a verdict in its behalf upon the further ground that the evidence shows that the accident was due to the sole negligence of the plaintiff's intestate and that the negligence of the plaintiff's intestate was the proximate cause of the accident which resulted in the injuries which caused his death.

21. That the court erred in instructing the jury in the following particulars, to-wit:

"If you agree upon that verdict unanimously you will fill in the amounts in the proper places, have your foreman sign and
213 date it and return with it into this room. On the contrary, if you find for the defendant unanimously, your verdict will be 'We, the jury in the above entitled action, find for the defendant," have your foreman sign that verdict and date it and then return with it into this room. If, however, after twelve hours' deliberation you fail to find a verdict unanimously, then under the laws you can find what is called a five-sixth verdict, that is ten or eleven of your number can return a verdict in favor of the plaintiff or in favor of the defendant, and if you should do that you will find similar forms as I have directed your attention to. But each one of you will concur in either verdict, if you agree upon it, will sign your names opposite the numbers and fill in the date, and it will not be necessary for your foreman to sign that verdict as such. The twelve hours will commence to run from the time the officer takes you in charge, and when you have agreed upon a verdict return with it into this room."

W. H. BREMNER,
F. M. MINER,
Attorneys for Defendant.

STATE OF MINNESOTA,
County of Hennepin.

District Court, 4th Judicial District.

GEORGE BOMBOLIS, as Administrator of the Estate of Constantine Nanos, alias Gust Nanos, Deceased, Plaintiff,
vs.
MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, Defendant.

Order.

The motion in the alternative for judgment in favor of the defendant, or in the event that such motion is denied then for a new trial in this action, having been regularly brought on for hearing and argument before the undersigned, one of the judges of said court, on the 6th day of June, 1914, W. H. Bremner and F. M.
214 Miner appearing as attorneys for the defendant in support of said motion and George B. Leonard and M. Rose appearing as attorneys for the plaintiff in opposition thereto, and the same having been fully argued and submitted, and the court being fully advised in the premises, now, therefore, it is ordered that said motion for judgment be and the same is hereby denied, and said motion for a new trial be and the same is hereby denied.

Dated June 17th, 1914.

By the Court,

CHARLES S. JELLEY, *Judge.*

215 STATE OF MINNESOTA:

In Supreme Court, October Term, 1914.

GEORGE BOMBOLIS, as Administrator of the Estate of Constantine Nanos, alias Gust Nanos, Deceased, Respondent,
vs.
THE MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, Appellant.

Assignments of Error.

1.

That the verdict is not justified by the evidence and is contrary to law.

2.

That the court erred in denying defendant's motion at the close of plaintiff's testimony, to dismiss the action.

216 3.

That the court erred in denying defendant's motion upon the first ground thereof, to-wit: Upon the whole case thus far made the plaintiff is not entitled to recover.

4.

That the court erred in denying defendant's motion upon the second ground thereof, to-wit: That plaintiff has failed to show that the defendant, or any of its employes, was guilty of any negligence which caused or contributed to the accident which resulted in the death of the plaintiff's intestate.

5.

That the court erred in denying defendant's motion upon the third ground thereof, to-wit: That the undisputed evidence shows that the plaintiff's intestate was himself guilty of negligence, which was the proximate cause of the accident which resulted in his death.

6.

That the court erred in denying defendant's motion upon the fourth ground, to-wit: That under the pleadings in this cause the plaintiff is not entitled to recover.

7.

That the court erred in denying defendant's motion upon the fifth ground thereof, to-wit: That the reply admits that a
217 settlement was made between John F. Bernhagen, special administrator of the estate of Gust Nanos, deceased; that is to say, that the defendant and John F. Bernhagen, as special administrator of said estate, did settle all claims of Gust Nanos against the defendant for and on account of the claimed wrongful killing of the plaintiff's intestate, in the sum of $700.00. No evidence has been offered tending to impeach, or in any way nullify that settlement.

8.

That the court erred in denying defendant's motion upon the sixth ground thereof, to-wit: For the reason that there is a fatal variance between the proof in this case and the specific acts of negligence alleged in the complaint.

9.

That the court erred in denying defendant's motion upon the seventh ground, to-wit: For the reasons stated in the motion to dismiss heretofore made, to-wit: That this action is brought under the terms of the statute of the United States, known as the Federal Employers' Liability Act, and it appears that the sole beneficiaries of the accident are non-resident aliens, and that non-resident aliens are not entitled to recover under the provisions of said law.

218 10.

That the court erred in denying defendant's motion upon the eighth ground thereof, to-wit: That no proof has been offered tend-

ing to show any financial loss to the person for whose benefit this action is brought; that is to say, no proof has been offered that the plaintiff's intestate contributed to the support, or had been contributing to the support, of those for whose benefit this action is brought, prior to his death.

11.

That the court erred in excluding Exhibit 3, being order for bond and letters of special administration, signed by George R. Smith, judge, in the matter of the estate of Gust Nanos, deceased.

12.

That the court erred in excluding Exhibit 4, being special administrator's bond, signed by John F. Bernhagen, the special administrator named in Exhibit 3, together with the approval of Judge George R. Smith endorsed thereon.

13.

That the court erred in excluding Exhibit 5, being the oath of John F. Bernhagen, as special administrator of the estate of Gust Nanos, deceased.

219 **14.**

That the court erred in excluding Exhibit 6, being special letters of administration issued to John F. Bernhagen, Hennepin County, Minnesota, as special administrator of the estate of Gust Nanos, deceased.

15.

That the court erred in excluding the testimony of F. M. Miner as to the facts offered to be proved by the testimony of said witness.

16.

That the court erred in excluding the testimony of John F. Bernhagen as to the facts offered to be proved by said witness.

17.

That the court erred in excluding the testimony of James E. Patterson as to the facts offered to be proved by said witness.

18.

That the court erred in denying defendant's notion to dismiss said cause, which motion was renewed at the close of all the testimony, and as heretofore set forth in subdivisions 3, 4, 5, 6, 7, 8, 9 and 10 hereof.

220

19.

That the court erred in denying defendant's motion to instruct the jury to return a verdict for the defendant upon each of the grounds set forth in its motion to dismiss.

20.

That the court erred in denying defendant's motion to instruct the jury to return a verdict in its behalf upon the further ground that the evidence shows that the accident was due to the sole negligence of the plaintiff's intestate, and that the negligence of the plaintiff's intestate was the proximate cause of the accident which resulted in the injuries which caused his death.

21.

That the court erred in instructing the jury in the following particulars, to-wit:

"If you agree upon that verdict unanimously you will fill in the amounts in the proper places, have your foreman sign and date it and return with it into this room. On the contrary, if you find for the defendant unanimously, your verdict will be: 'We the jury in the above entitled action find for the defendant,' have your foreman sign that verdict and date it and then return with it into this room. If, however, after twelve hours' deliberation you fail to find a verdict unanimously, then under the laws you can find what is called a five sixths verdict, that is ten or eleven of your number can return a verdict in favor of the plaintiff or in favor of the defendant, and if you should do that you will find
221 similar forms as I have directed your attention to. But each one of you who concur in either verdict, if you will agree upon it, will sign your names opposite the numbers and fill in the date, and it will not be necessary for your foreman to sign that verdict as such. The twelve hours will commence to run from the time the officer takes you in charge, and when you have agreed upon a verdict return with it into this room."

W. H. BREMNER,
F. M. MINER,
Attorneys for Appellant.

222 STATE OF MINNESOTA,
County of Hennepin:

District Court, Fourth Judicial District.

GEORGE BOMBOLIS, as Administrator of the Estate of Constantine Nanos, alias Gust Nanos, Deceased, Plaintiff,
vs.
THE MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, Defendant.

Notice of Appeal.

To George B. Leonard, attorney for plaintiff, and Peter S. Neilson, clerk of said district court:

You will please take notice, that the defendant appeals to the Supreme Court of the State of Minnesota, from an order denying defendant's motion for judgment notwithstanding the verdict or for a new trial, said order being made, entered and filed in the above entitled action on the 16th day of June, 1914.

W. H. BREMNER,
F. M. MINER,
Attorneys for Defendant.

(Endorsed:) Due service of the within by copy is hereby admitted at Minneapolis, this 2d day of July A. D. 1914. Geo. B. Leonard, Attorney for Pl'ff. Service admitted this 2nd day of July A. D. 1914. P. S. Neilson, Clerk, by Geo. H. Hemperley, Deputy. Filed July 2, 1914. P. S. Neilson, Clerk, by C. Wunderman, Deputy.

223 STATE OF MINNESOTA,
County of Hennepin:

District Court, Fourth Judicial District.

GEORGE BOMBOLIS, as Administrator of the Estate of Constantine Nanos, alias Gust Nanos, Deceased, Plaintiff,
vs.
THE MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, Defendant.

Bond on Appeal.

Know all men by these presents, that we, The Minneapolis & St. Louis Railroad Company, as principal, and United States Fidelity and Guaranty Company, as surety, are bound and firmly held unto George Bombolis, as Administrator of the Estate of Constantine Nanos alias Gust Nanos, Deceased, his heirs, executors, or administrators or assigns, — we jointly and severally bind ourselves, our executors or assigns.

The condition of this obligation is such that,

Whereas, the said The Minneapolis & St. Louis Railroad Com-

pany, defendant in the above entitled action, has appealed to the Supreme Court from an order overruling defendant's motion for a judgment notwithstanding the verdict or for a new trial, entered in said action on the 16th day of June, 1914.

Now, therefore, if the appellant shall pay all the costs of said appeal and the damages sustained by the respondent in consequence thereof, if said order or any part thereof is affirmed, or said appeal dismissed, and abide and satisfy the judgment or order which the Appellate Court may give therein, then this obligation, which is given in pursuance of Section 4367 of the Revised Laws of 1905, shall be void; otherwise to remain in full force and effect.

In testimony whereof, we have hereunto set our hands this 1 day of July, 1914.

THE MINNEAPOLIS & ST. LOUIS RAILROAD CO.,
By F. M. MINER, *General Attorney.*

UNITED STATES FIDELITY & GUARANTY COMPANY,
By E. A. FORCE AND WIRT WILSON,
Its Attorneys-in-Fact.

[Corporate Seal.]

In presence of

224 E. S. REDEL,
B. W. SCALLEN.
M. J. HURLEY.

STATE OF MINNESOTA,
County of Hennepin, ss:

On this first day of July, 1914, before me, a Notary Public, within and for said county and state, personally appeared E. A. Force and Wirt Wilson, to me personally known, who being by me duly sworn upon oath did say that they are the Agents and Attorneys-in-fact of and for the United States Fidelity and Guaranty Company, a corporation of Baltimore, Maryland, created, organized, and existing under and by virtue of the laws of the State of Maryland; that the corporate seal affixed to the foregoing within instrument is the seal of said Company; that the said seal was affixed and the said instrument was executed by authority of its Board of Directors; and the said E. A. Force and Wirt Wilson did acknowledge the said instrument as the free act and deed of said Company.

[NOTARIAL SEAL.] BLANCHE W. SCALLEN,
Notary Public, Hennepin County, Minnesota.

(Endorsed:) The within Bond and the sureties therein named are hereby approved this 3rd day of July, 1914. Joseph W. Molyneaux, Judge of District Court. Filed Jul- 2, 1914. P. S. Neilson, Clerk, by C. Wunderman, Deputy.

225 STATE OF MINNESOTA,
County of Hennepin:

District Court, Fourth Judicial District.

I, P. S. Neilson, Clerk of the above named Court, do hereby certify and return to the Supreme Court of the State of Minnesota, that I have compared the papers writing to which this certificate is attached with the original Notice of Appeal to Supreme Court, and Bond *in* Appeal, Supreme Court, in the action therein entitled, as the same appear of record and on file in the said Clerk's office, at the Court House in said Hennepin County, Minnesota, and find the same to be true and correct copies thereof, and of the whole thereof.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said District Court, at the City of Minneapolis, in said County, this 3rd day of July, A. D. 1914.

[District Court Seal.]

P. S. NEILSON,
Clerk of District Court,
By C. N. WILLIAMSON, *Deputy.*

(Endorsed:) Filed Jul- 6, 1914. I. A. Caswell, Clerk.

226 18922.

STATE OF MINNESOTA:

Supreme Court, October Term, A. D. 1914.

No. 154.

GEORGE BOMBOLIS, as Adm'r, Respondent,
v.
MINNEAPOLIS & ST. LOUIS R. R. COMPANY, Appellant.

Syllabus.

In this action under the Federal Employers' Liability Act to recover for the death of plaintiff's intestate, it is held:

1. The evidence made a case for the jury, and is sufficient to sustain the verdict.

2. There was no fatal variance between the allegations of negligence and the proof.

3. It conclusively appeared that no petition was presented to the probate court for the appointment of a special administrator. Such petition is jurisdictional, and without it, the probate court has no jurisdiction to appoint such administrator, to approve his bond or to issue letters of administration. Such orders are nullities, and a settlement made by the special administrator so attempted to be ap-

pointed, in no way binds the next of kin of deceased dependent upon him for support.

4. The allegations of the reply were sufficient to raise the question of the jurisdiction of the probate court.

5. Non-resident aliens are entitled to the benefits of the Federal Employers' Liability Act.

6. The five-sixths jury law applies in an action in the State Court based upon the Federal Statute, following Winters v. M. & St. L. Ry. Co., 148 N. W. 106.

Order affirmed.

227 18922.

STATE OF MINNESOTA:

Supreme Court, October Term, A. D. 1914.

No. 154.

GEORGE BOMBOLIS, as Adm'r, Respondent,
v.
MINNEAPOLIS & ST. LOUIS R. R. COMPANY, Appellant.

Opinion.

This action is to recover damages for the death of plaintiff's intestate, alleged to have been caused by defendant's negligence. There was a verdict for plaintiff in the sum of $3,750.00, the damages being apportioned as required by the Federal Act under which the action was brought. Defendant moved for judgment notwithstanding the verdict or for a new trial, and appealed to this court from an order denying this motion.

1. It is first contended that there was no proof of negligence on the part of defendant sufficient to justify submission of the issue to the jury, or at least that the evidence did not warrant the jury in deciding this issue against the defendant.

The accident happened in the Kenwood yards of defendant in Minneapolis. At the place where it occurred defendant has two main tracks, designated the North-bound and the South-bound mains. A lead track connects with one of the main tracks some distance away, and runs parallel with the two mains. The distance between the middle track and each of the other tracks is about ten
228 feet. Plaintiff's intestate, Nanos, and seven other employes of defendant were engaged in the work of removing old ties from the middle track and substituting new ones. The method of removing an old tie was to draw it out from under the rails in a trench dug between the middle track and the lead at right angles to the tracks. The ties were eight feet long. After the ties were drawn out they were laid parallel to and between the tracks. While Nanos and his "partner" were in the space between the middle track and the lead track, with their picks in a tie, a freight train on the middle

track signalled its approach. The men observed the warning and hurried to clear away obstructions from the course of the approaching train. Nanos and his partner were engaged in turning parallel with the tracks a tie that they had just pulled from under the middle track. This was necessary in order to prevent the engine of the approaching train from striking it. The freight train passed, and at about the same time a switch engine on the lead track struck Nanos, causing his death.

The negligence alleged and relied upon is the failure of the switch engine crew to give the men working between the tracks a warning of its approach. No such warning was in fact given, or at least the jury was abundantly justified in so finding. There was testimony by at least four witnesses that it was the custom to give warn-
229 ing of the approach of a switch engine whenever there were men working on the track. We think that the question whether the engineer of the switch engine was negligent in not ringing his bell as he approached these men was for the jury, and that the evidence sustains the verdict on this issue. It is urged that the engineer ought not to have anticipated that the men working on the main track would take a position on or so near the lead track as to be in danger from the switch engine. But their work required them to be between the main track and the lead, the freight train was approaching on the main track, and the men were getting out of its way. It is not going very far or imposing a very onerous duty to hold that the engineer should have rung the bell.

Whether deceased was negligent was quite plainly a jury question. The case being under the federal Employers' Liability Act, contributory negligence was not a defense, and for all that we know the jury may have found Nanos negligent, and reduced the damages accordingly. This renders unnecessary a decision of the sufficiency of the ordinance to support a conclusion that deceased was not negligent.

[2] 2. We find no merit in defendant's claim that there was a fatal variance between the negligence pleaded and that proved. The complaint alleged that no warning was given of the approach of the switch engine. It was not necessary that each allegation of fact be proved as alleged.

[3] 3. Defendant's main argument concerns its claim that it settled the cause of action with a special administrator of the estate of the deceased. The answer pleaded that John F. Bernhagen was, by the probate court of Hennepin county, duly appointed special administrator of the estate of the deceased, that he gave bond and qualified, and that hereafter it was agreed between said administrator and defendant that defendant should pay in full compromise and settlement of all liability for the accident the sum of $700; that this sum was paid to and received by the administrator, and writings given releasing defendant from liability. The reply contained a general denial, an admission that the probate court "did grant a form of order assuming to appoint Bernhagen administrator," and lengthy allegations of fraud in procuring the order, and in the settlement thereafter made.

On the trial, to sustain its defense of settlement, defendant offered in evidence the order of the probate court appointing the special administrator, the bond and order approving it, and the letters of special administration. Plaintiff's attorney stated that he understood counsel that no written petition was filed in the probate court for the appointment of a special administrator, and that the order
230 appointing Bernhagen was made without any petition being on file. Counsel for defendant then said: "Yes, we have no objection to admitting that, sir." Plaintiff then objected to the offered exhibits, because it appeared that the probate court never acquired jurisdiction over the estate of the deceased. The objection was sustained, but, on request of counsel for defendant, the matter was deferred until the following morning. When court convened then, defendant's counsel modified the admission made the day before, that no petition was filed in the probate court, by admitting that this was true as far as the probate court records showed. The trial court did not think that this changed the aspect of the case, ruled that it appeared that no petition for the administrator was filed prior to the appointment, that this was jurisdictional, and sustained the objection. Defendant then proceeded to offer evidence of the settlement alleged. Objections were sustained. Among the offers of evidence so made was one to show that Mr. Patterson, an attorney, called upon the probate judge, discussed with him the death of Nanos, and asked what was best to be done. The judge advised the appointment of a special administrator, and stated he would appoint Mr. Bernhagen. Patterson asked if he should file a petition, and the judge replied it would not be necessary.

It seems very clear that it was a conceded fact that no written petition was presented to the probate court, and we hold that no such petition was presented, not merely that no petition appeared in the files. It is therefore as if the want of jurisdiction, if a petition was jurisdictional, appeared from the face of the proceedings. The question then is: Was a written petition a jurisdictional prerequisite to the appointment of a special administrator? If it was, the order of appointment and subsequent proceedings were void, and subject to collateral attack. If not, if the failure to file or present a petition was merely an irregularity, it does not make the proceedings void.

The Constitution gives the probate court jurisdiction over the estates of deceased persons. But to exercise this jurisdiction, it is necessary that the court be called upon to act in the manner provided by law. Culver v. Hardenbergh, 37 Minn. 225, 33 N. W. 792, As stated in Hanson v. Nygaard, 105 Minn. 30, 117 N. W. 235, 127 Am. St. Rep. 523:

"The Constitution of the state confers upon the probate courts general and exclusive jurisdiction over the estates of deceased persons. * * * This jurisdiction in the abstract is conferred upon the probate court of the state as a whole; but it can only be exercised by a particular court in a particular instance, and over a particular estate, when it has been invoked in the manner prescribed by the statutes. When thus invoked by a person entitled to take such action, the jurisdiction of that court attaches to the estate for the pur-

pose of supervising, directing, and controlling its administration and settlement according to law."

Was the jurisdiction of the probate court over the estate of
231 Nanos invoked in the manner perscribed by our statutes? We unhesitatingly answer this question in the negative.

G. S. 1913, § 7227, provides:

"Every proceeding in the probate court shall be commenced by petition briefly setting forth the ground for the application, and signed by or on behalf of the party making the same, and be verified as in the case of pleadings in civil actions."

That this statute applies to a proceeding for the appointment of a special administrator there can be no doubt. It is a general provision, and by its own terms applies to every proceeding. In Hanson v. Nygaard, supra, it was held that the failure to give notice to interested parties of the hearing on a petition for the appointment of an administrator was an irregularity merely, and not a jurisdictional defect. But it was plainly held that a petition was necessary to confer jurisdiction. Mr. Justice Elliott said:

"Our conclusion, therefore, is that the jurisdiction of the probate court over the estate of a deceased person attaches when its general jurisdiction is invoked by the presentation to the court of a proper petition by some person entitled to take such action."

The statute authorizing the appointment of a special administrator, G. S. 1913, § 7293, permits it to be made "with or without notice," but it does not say or intimate that it may be made without a petition. This statute was considered in Hanson v. Nygaard, and was said to authorize the appointment of a special administrator without notice, but not that it could be done without a petition. But it needs no authorities to substantiate the proposition that the probate court cannot act unless it is asked to do so in the manner prescribed by statute. We hold that the probate court had no jurisdiction over the estate of Nanos, no power to appoint a special administrator, until a petition was presented to it by some person entitled to take such action. It appearing conclusively that no such petition was presented in this case, it follows that the orders appointing the special administrator, approving his bond, and granting letters of administration, were absolutely void. It is of course elementary that letters of administration issued by a court with jurisdiction are not subject to collateral attack for error or irregularity, but where the court is without jurisdiction the letters are void, and may be attacked collaterally. This also is elementary. It is the universal rule, applicable to orders and judgments of all courts. Sache v. Wallace, 101 Minn. 169, 112 N. W. 386, 11 L. R. A. (N. S.) 803, 118 Am. St. Rep. 612, 11 Ann. Cas. 348. The case cited is also abundant authority, if any is needed, that a grant of "jurisdiction of the subject-matter" does not authorize a court to determine questions not brought before it by the pleadings. A fortiori, the general jurisdiction of probate courts over the estates of decedents does not authorize
232 a particular court to act in a particular estate without any pleading invoking its jurisdiction.

[4] 4. We do not sustain the claim that the reply was insufficient

to raise the question of the want of jurisdiction of the probate court. It is true that fraud was pleaded, but there was a denial that a special administrator was appointed. This was sufficient to put in issue the validity of the pretended order.

The conclusion thus reached makes the settlement relied on an absolute nullity, though it be conceded that a special administrator regularly appointed has power to settle a cause of action for damages sustained by the next of kin of the decedent dependent upon him for support, without the consent or knowledge of the real parties in interest to or of either the appointment or the settlement. Foot v. Great Northern Ry. Co., 81 Minn. 493, 84 N. W. 342, 52 L. R. A. 354, 83 Am. St. Rep. 395; Jones v. Minnesota Transfer Ry. Co., 108 Minn. 129, 121 N. W. 606. This is a question we do not decide.

[5] 5. Whether next of kin who are non-resident aliens are entitled to the benefits conferred by the federal Employers' Liability Act is a question which has not been directly decided by the Supreme Court of the United States. In the absence of such a decision, we follow Renlund v. Commodore Mining Co., 89 Minn. 41, 93 N. W. 1057, 99 Am. St. Rep. 534, holding our state statute to be for the benefit of nonresident aliens, as well as residents of this State and of other States, and hold that the nonresident aliens are entitled to the benefits of the federal act.

[6] 6. Following Winters v. Minneapolis & St. Louis Ry. Co., 148 N. W. 106, we hold that, in an action in a state court based upon the federal Employers' Liability Act, the five-sixths jury law (G. S. 1913, § 7805) applies.

Order affirmed.

BUNN, *J.*

(Endorsed:) Filed December 31, 1914. I. A. Caswell, Clerk.

233 STATE OF MINNESOTA:

Supreme Court, General October Term, A. D. 1914.

Friday morning, 9:30 o'clock, December 11 A. D. 1914 Court convened pursuant to adjournment.

Reg. No. 18922, Cal. No. 154.

GEORGE BOMBOLIS, as Administrator of the Estate of Constantine Nanos, alias Gust Nanos, Deceased, Respondent,

vs.

MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, Appellant.

This cause came on to be heard this day upon the return to the appeal herein.

Thereupon the same was argued by counsel, submitted to the court for decision and taken under advisement.

A true record.

[Seal of the Supreme Court, State of Minnesota.]

Attest:

I. A. CASWELL, *Clerk.*

The foregoing is a full and true copy of the Minutes of Argument in the above entitled cause.

Attest:

[SEAL.] I. A. CASWELL, *Clerk,*
By —— ——, *Deputy.*

(Endorsed:) Filed Jan. 13 1915. I. A. Caswell, Clerk.

234 STATE OF MINNESOTA:

Supreme Court, October Term, A. D. 1915.

No. 154.

GEORGE BOMBOLIS, as Administrator of the Estate of Constantine Nanos, alias Gust Nanos, Deceased, Respondent,
vs.
MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, Appellant.

Appeal from District Court, Fourth Judicial District, County of Hennepin.

This cause having been duly argued and submitted at the General October Term of this court A. D. 1914 upon the return to the appeal herein.

Now, after full and mature deliberation had thereon, it is here and hereby ordered that the order of the Court below, herein appealed from, be and the same hereby is, in all things affirmed and that judgment be entered accordingly.

Entered January 13 A. D. 1915.

By the Court.

Attest:

[SEAL.] I. A. CASWELL, *Clerk.*

I hereby certify that the foregoing is a full and true copy of the original Order for judgment entered in the above entitled cause.

Attest:

I. A. CASWELL, *Clerk.*

(Endorsed:) Filed Jan. 13 1915. I. A. Caswell, Clerk.

235 STATE OF MINNESOTA:

Supreme Court, October Term, A. D. 1914.

No. 154.

GEORGE BOMBOLIS, as Administrator of the Estate of Constantine Nanos, alias Gust Nanos, Deceased, Respondent,

vs.

MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, Appellant.

Pursuant to an order of Court duly made and entered in this cause January 13 A. D. 1915,

It is here and hereby determined and adjudged that the order of the Court below, herein appealed from, to-wit, of the District Court of the Fourth Judicial District, sitting within and for the County of Hennepin be and the same hereby is in all things affirmed.

And it is further determined and adjudged that the Respondent above named, do have and recover of said Appellant herein the sum and amount of Fifty-two and 50/100 Dollars, ($52.50) costs and disbursements in this cause in this Court, and that execution may be issued for the enforcement thereof.

Dated and signed January 13 A. D. 1915.

By the Court.

Attest:

I. A. CASWELL, *Clerk.*

Statement for Judgment.

Statutory Costs, $25.00; Printer, $16.50; Clerk, $11.00; Acknowledgments, $—; Return, $—; Postage and Express, $—; Filing Mandate, $—. Total, $52.50.

236 STATE OF MINNESOTA,
Supreme Court, ss:

I, I. A. Caswell, Clerk of said Supreme Court, do hereby certify that the foregoing is a full and true copy of the Entry of Judgment in the cause therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within copy with said original and that the same is a correct transcript therefrom.

Witness my hand and seal of said Supreme Court at the Capitol, in the City of St. Paul, January 13 A. D. 1915.

[SEAL.] I. A. CASWELL, *Clerk.*

State of Minnesota Supreme Court. Transcript of Judgment. Filed Jan. 13 A. D. 1915. I. A. Caswell, Clerk.

237 STATE OF MINNESOTA:

Supreme Court.

No. 18922.

GEORGE BOMBOLIS, as Administrator of the Estate of Constantine Nanos, alias Gust Nanos, Deceased, Respondent,
vs.
MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, Appellant.

Judgment Roll.

(Endorsed:) Filed January 13 1915. I. A. Caswell, Clerk.

238 STATE OF MINNESOTA,
County of Hennepin:

District Court, Fourth Judicial District.

GEORGE BOMBOLIS, as Administrator of the Estate of Constantine Nanos, alias Gust Nanos, Deceased, Plaintiff,
vs.
THE MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, Defendant.

Notice of Appeal.

To George B. Leonard, Attorney for Plaintiff, and P. S. Neilson, Clerk of said District Court:

You will please take notice, That the defendant appeals to the Supreme Court of the State of Minnesota, from a judgment entered on the verdict in said action on the 25th day of January, 1915.

W. H. BREMNER,
F. M. MINER,
Attorneys for Defendant.

Due and legal service of the above notice is hereby admitted this 25th day of January, 1915.

GEO. B. LEONARD,
Attorney for Plaintiff.

Service admitted this 27th day of January, A. D. 1915. P. S. Neilson, Clerk, By Geo. H. Hemperley, Deputy. Filed Jan. 27, 1915. P. S. Neilson, Clerk. By C. Wunderman, Deputy.

239 STATE OF MINNESOTA,
County of Hennepin:

District Court, Fourth Judicial District.

GEORGE BOMBOLIS, as Administrator of the Estate of Constantine Nanos, alias Gust Nanos, Deceased, Plaintiff,
vs.
THE MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, Defendant.

Bond on Appeal.

Know all men by these presents, that we, The Minneapolis & St. Louis Railroad Company, as principal, and United States Fidelity and Guaranty Company, as surety, are bound and firmly held unto the plaintiff, in the above entitled action, in the sum of Five Thousand Dollars ($5,000.00), to the payment of which to the said George Bombolis, as Administrator of the Estate of Constantine Nanos, alias Gust Nanos, deceased, his heirs, executors, or administrators or assigns, we jointly and severally bind ourselves, our executors or assigns.

The condition of this obligation is such that,

Whereas, the said The Minneapolis & St. Louis Railroad Company, defendant in the above entitled action, has appealed to the Supreme Court from a judgment entered on the verdict in said action on the 25th day of January, 1915.

Now, therefore, if the appellant shall pay all the costs of said appeal and the damages sustained by the respondent in consequence thereof, if said judgment, or any part thereof, is affirmed, or said appeal dismissed, and abide and satisfy the judgment or order which the appellate court may give therein, then this obligation, which is given in pursuance of Section 8003 of the General Statutes 1913, shall be void; otherwise to remain in full force and effect.

In Testimony Whereof, we have hereunto set our hands this 26th day of January, 1915.

[CORPORATE SEAL.]

THE MINNEAPOLIS & ST. LOUIS RAILROAD CO.,
By F. M. MINER, *General Attorney.*
UNITED STATES FIDELITY AND GUARANTY CO.,
By E. A. FORCE AND
GEORGE E. MURPHY,
Its Attorneys-in-Fact.

In presence of
A. M. REDEL.
MAXWELL SUSSMAN.
H. J. WENTZELL.

240 STATE OF MINNESOTA,
County of Hennepin, ss:

On this 26" day of January, 1915, before me, a Notary Public within and for said county and state, personally appeared E. A. Force and George E. Murphy, to me personally known, who being by me duly sworn upon oath did say that they are the Agents and Attorneys-in-fact of and for the United State- Fidelity & Guaranty Company, a corporation of Baltimore, Maryland, created, organized and existing under and by virtue of the laws of the State of Maryland; that the corporate seal affirmed to the foregoing within instrument is the seal of said Company; that the said seal was affixed and the said instrument was executed by authority of its Board of Directors; and the said E. A. Force and George E. Murphy did acknowledge that they executed the said instrument as the free act and deed of said Company.

[NOTARIAL SEAL.] MAXWELL SUSSMAN,
Notary Public, Hennepin County, Minnesota.

My commission expires November 18, 1920.

(Endorsed:) The within Bond is hereby approved this 29th day of January, 1915. Charles S. Jelley, Judge. Filed Jan. 27, 1915. P. S. Neilson, Clerk, by C. Wunderman, Deputy.

241 STATE OF MINNESOTA,
County of Hennepin, ss:

District Court, Fourth Judicial District.

I, P. S. Neilson, Clerk of the above named Court, do hereby certify and return to the Supreme Court of the State of Minnesota, that I have compared the papers writing to which this certificate is attached with the original Notice of Appeal to Supreme Court, and Bond in Appeal, Supreme Court, in the action therein entitled, as the same appear of record and on file in the said Clerk's office, at the Court House in said Hennepin County, Minnesota, and find the same to be true and correct copies thereof, and of the whole thereof.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said District Court, at the City of Minneapolis, in said County, this 27th day of January, A. D. 1915.

[District Court Seal.]

P. S. NEILSON,
Clerk of District Court,
By C. N. WILLIAMSON, *Deputy.*

(Endorsed:) Filed Jan. 30, 1915. I. A. Caswell, Clerk.

242 18922.

STATE OF MINNESOTA:

Supreme Court, October Term, A. D. 1914.

No. 154.

GEORGE BOMBOLIS, Adm'r, Respondent,
v.
MINNEAPOLIS & ST. LOUIS R. R. COMPANY, Appellant.

Per Curiam:

This is an appeal by the defendant from a judgment entered on the verdict after the decision of this court affirming an order denying defendant's motion in the alternative for judgment notwithstanding the verdict or for a new trial. Bombolis v. M. & St. L. R. Co., 150 N. W. 385. The case was presented on this appeal on the briefs and argument on the former appeal. For the reasons stated in the former opinion the judgment appealed from is affirmed.

(Endorsed:) Per Curiam Opinion. Filed April 7, 1915. I. A. Caswell, Clerk.

243 STATE OF MINNESOTA:

Supreme Court, April Term, 1915.

GEORGE BOMBOLIS, as Administrator of the Estate of Constantine Nanos, alias Gust Nanos, Deceased, Respondent,
vs.
THE MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, Appellant.

Stipulation.

It is hereby stipulated by and between the above named respondent and the above named appellant that the Clerk of said Court be and he hereby is authorized and requested to enter final judgment in said court in favor of said respondent and against said appellant for the sum of Four thousand seventy-eight and 12/100 ($4,078.12) Dollars, being the amount of the verdict and costs of the District Court of Hennepin County, Minnesota, with interest thereon up to the 12th day of April, 1915, respondent's costs in this court ($25.00), and the fee of the clerk of this court ($5.00). Dated April 12, 1915.

GEO. B. LEONARD,
Attorney for Respondent.
W. H. BREMNER,
F. M. MINER,
Attorneys for Appellant.

(Endorsed:) Due service of the within by copy is hereby admitted at Mpls. Minn. this 9 day of April, A. D. 1915. Filed Apr. 13, 1915. I. A. Caswell, Clerk.

244 STATE OF MINNESOTA:

Supreme Court, October Term, A. D. 1914.

No. 154.

GEORGE BOMBOLIS, as Administrator of the Estate of Constantine Nanos, alias Gust Nanos, Deceased, Respondent,

vs.

THE MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, Appellant.

Pursuant to an order of Court duly made and entered in this cause April 13, A. D. 1915 it is here and hereby determined and adjudged that the judgment of the Court below, herein appealed from, to-wit, of the District Court of the Fourth Judicial District, sitting within and for the County of Hennepin be and the same hereby is in all things affirmed.

And it is further determined and adjudged that the Respondent above named, do have and recover of said Appellant herein the sum and amount of Four Thousand Seventy-eight and 12/100 Dollars ($4,078.12) which includes costs and disbursements in this cause in this Court, and that execution may be issued for the enforcement thereof.

Dated and signed April 13, A. D. 1915.

By the court.

Attest:

I. A. CASWELL, *Clerk.*

Statement for Judgment.

Statutory Costs, $—; Printer, $—; Clerk, $—; Acknowledgments, $—; Return, $—; Postage and Express, $—; Filing Mandate, —. Total, $4,078.12.

245 STATE OF MINNESOTA,
Supreme Court, ss:

I, I. A. Caswell, Clerk of said Supreme Court, do hereby certify that the foregoing is a full and true copy of the Entry of Judgment in the cause therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within copy with said original and that the same is a correct transcript therefrom.

Witness my hand and seal of said Supreme Court at the Capitol, in the City of St. Paul April 13 A. D. 1915.

[SEAL.] I. A. CASWELL, *Clerk.*

State of Minnesota, Supreme Court. Transcript of Judgment. Filed April 13, A. D. 1915. I. A. Caswell, Clerk.

246 STATE OF MINNESOTA:

Supreme Court, October Term, A. D. 1914.

No. 154.

GEORGE BOMBOLIS, as Administrator of the Estate of Constantine Nanos, alias Gust Nanos, Deceased, Respondent,
vs.
MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, Appellant.

Appeal from District Court, Fourth Judicial District, County of Hennepin.

This cause having been duly argued and submitted at the General October Term of this court A. D. 1914 upon the return to the appeal herein.

Now, after full and mature deliberation had thereon, it is here and hereby ordered that the judgment of the Court below, herein appealed from, be and the same hereby, is, in all things affirmed and that judgment be entered accordingly.

Entered April 13, A. D. 1915.

By the court.

Attest:

I. A. CASWELL, *Clerk.*

I hereby certify that the foregoing is a full and true copy of the original Order for judgment entered in the above entitled cause.

Attest:

[SEAL.] I. A. CASWELL, *Clerk.*

(Endorsed:) Filed April 13, 1915. I. A. Caswell, Clerk.

247 18922. State of Minnesota, Supreme Court. George Bombolis, Adm., Respondent, against M. & St. L. R. R. Co., Appellant. Judgment Roll. Filed April 13, 1915. I. A. Caswell, Clerk.

248 *Authentication of Record.*

SUPREME COURT,
State of Minnesota, ss:

I, I. A. Caswell, clerk of said court, do hereby certify that the foregoing is a true, full and complete transcript of the record and proceedings in the case of George Bombolis, as administrator, etc., Respondent, vs. The Minneapolis & St. Louis Railroad Company, Appellant, and also of the assignments of error to said court and of the opinions of the court rendered therein, as the same now appear on file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed

the seal of said court at my office, in St. Paul, Minnesota, this 10th day of May, 1915.

[Seal of the Supreme Court, State of Minnesota.]

I. A. CASWELL,
Clerk Supreme Court of Minnesota.

249 STATE OF MINNESOTA,
In Supreme Court:

GEORGE BOMBOLIS, as Administrator of the Estate of Constantine Nanos, alias Gust Nanos, Deceased, Respondent,
vs.
THE MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, Appellant.

Assignment of Errors.

Comes now the appellant and files the following assignment of errors upon which it will rely upon its prosecution of the writ of error in the above entitled cause:

1. That the Supreme Court of the State of Minnesota erred in affirming the decision of the District Court of Hennepin County, Minnesota, denying appellant's motion in the alternative for judgment notwithstanding the verdict or to set aside the verdict and grant a new trial, and in holding and decreeing that the respondent, George Bombolis, as Administrator of the Estate of Constantine Nanos, alias Gust Nanos, deceased, was entitled to recover from the appellant, The Minneapolis & St. Louis Railroad Company.

2. That the Supreme Court of the State of Minnesota erred in finding, holding and decreeing that the appellant, The Minneapolis & St. Louis Railroad Company was not entitled to judgment in its favor notwithstanding the verdict.

3. That the Supreme Court of the State of Minnesota erred in holding and decreeing that the appellant, The Minneapolis & St. Louis Railroad Company, was not entitled to a new trial.

4. That the Supreme Court of the State of Minnesota erred in holding and decreeing and reaffirming its former opinion by affirming the judgment rendered in the District Court of the State of Minnesota in favor of said respondent and against the appellant.

250 5. That the Supreme Court of the State of Minnesota erred in entering final judgment in favor of said respondent and against this appellant.

6. That the Supreme Court of the State of Minnesota erred in adjudging and decreeing that the District Court of the State of Minnesota in which the trial occurred, was a court of competent jurisdiction for the trial of said cause founded upon the Federal Employers' Liability Act, said court by the constitution and laws of the state of Minnesota acting under a five-sixths jury law pursuant to which after twelve hours' deliberation, less than twelve men are authorized and empowered to render a verdict, in that such provision of the constitution and laws of the state of Minnesota deprived this defendant

of a right given to it by the Constitution and laws of the United States which entitled the defendant to a unanimous verdict by a jury of twelve men.

WILLIAM H. BREMNER,
F. M. MINER,
Attoneys for Appellant and Plaintiff in Error.

250½ [Endorsed:] 18922. Original. State of Minnesota, County of ——, Supreme Court. Geo. Bombolis, as Adm'r Est. Constantine Nanos, alias Gust Nanos, deceased, Respondent, vs. M. & St. L. R. R. Appellant. Assignment of Errors. Due service of the within by copy is hereby admitted at —— this — day of ——, A. D. 19—. —— ——, Attorney for —. W. H. Bremner, F. H. Miner, Attorneys for Appellant, 1104 Metropolitan Life Bldg., Minneapolis, Minn. Filed Apr. 23, 1915. I. A. Caswell, Clerk.

251 STATE OF MINNESOTA,
In Supreme Court:

GEORGE BOMBOLIS, as Administrator of the Estate of Constantine Nanos, alias Gust Nanos, Deceased, Respondent,
vs.
THE MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, Appellant.

Petition for Writ of Error.

To the Honorable Chief Justice of the Supreme Court of Minnesota:

Comes now the appellant in the above entitled cause and respectfully shows:

That on the 31st day of December, 1914, the above entitled court handed down its decision in the above entitled case affirming the order entered in said case in the District Court of Minnesota in and for Hennepin County, denying Appellant's motion in the alternative for judgment in its favor notwithstanding the verdict or for a new trial, from which court the appeal to this court was prosecuted; that thereafter a remittitur was sent from this court to said District Court of Hennepin County aforesaid, and on the 25th day of January, 1915 the said District Court of Hennepin County entered judgment upon the verdict in this cause in favor of the said Respondent and against the said Appellant for the sum of Three thousand nine hundred ninety-six and 82/100 ($3,996.82) Dollars damages, interest and costs; that thereafter and on January 27th, 1915 said Appellant appealed from said judgment so rendered in said District Court of Hennepin County to this court, and on the 7th day of April, 1915, this court rendered a Per Curiam opinion wherein upon the entire record of above appeals and its former opinion, it affirmed said judgment, and thereupon the clerk of this Court on the 13th day of April, 1915, entered judgment herein in favor of said Respondent and against this Appellant for the sum of Four thousand seventy-eight and twelve one hundredths Dollars ($4,078.12) that said
252 decision and judgment are final as to the rights of the parties in this case; that the said The Minneapolis & St. Louis Rail-

road Company Appellant, was and is aggrieved in that in said decision and judgment and in the proceedings had prior thereto in this case, certain errors were committed to its prejudice; that this is an action arising under certain statutes of the United States, viz: the act of June 22nd, 1908, 35 Statutes at Large 65, Chap. 149, being an act relating to the liability of common carriers by railroads to their employes in certain cases and commonly known as the "Employers' Liability Act," together with all amendments to said act and each thereof passed by Congress since said statute was first enacted; that because of the construction given by this court to said statute, certain rights and titles claimed by the Appellant under and pursuant to said statute referred to, were denied to it and the decision of this court is against the said title and rights so claimed by the said The Minneapolis & St. Louis Railroad Company, Appellant, and, as it believes, contrary to the said statute of the United States and the proper construction thereof.

That the above entitled court is the highest court of the State of Minnesota in which a decision could be had in this case and that the decision and judgment so rendered and entered by the Supreme Court of Minnesota is unwarranted in law as Appellant is advised.

Appellant presents herewith an Assignment of Errors and a Bond in proper form and prays for an order allowing said Appellant to prosecute a Writ of Error in this case to the Supreme Court of the United States under and in accordance with the laws of the United States in that behalf made and provided; and that an order be entered herein staying all further proceedings in this cause until the determination of said Writ of Error.

WILLIAM H. BREMNER,
F. M. MINER,
Attorneys for Appellant.

253 Writ of Error allowed this 19th day of April, 1915.

CALVIN L. BROWN,
Chief Justice Supreme Court of Minnesota.

Filed —.

—— ——, *Clerk.*

[Endorsed:] 18922. Original. State of Minnesota, County of —, Supreme Court. Geo. Bombolis, as Adm'r Est. Constantine Nanos, alias Gust Nanos, deceased, Respondents, vs. M. & St. L. R. R. Defendant. Petition for Writ of Error. Due service of the within by copy is hereby admitted at —— this — day of ——, A. D. 19—. —— ——, Attorney for —. W. H. Bremner, F. M. Miner, Attorneys for Appellant, 1104 Metropolitan Life Bldg., Minneapolis, Minn. Filed Apr. 23 1915. I. A. Caswell, Clerk.

254 STATE OF MINNESOTA,
In Supreme Court:

GEORGE BOMBOLIS, as Administrator of the Estate of Constantine Nanos, alias Gust Nanos, Deceased, Respondent,
vs.
THE MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, Appellant.

Bond on Writ of Error.

Know all men by these presents, that we, The Minneapolis & St. Louis Railroad Company, a Minnesota corporation, as principal, and the United States Fidelity & Guaranty Company, a corporation organized under the laws of the State of Maryland, as surety are held and firmly bound unto George Bombolis in the full and just sum of Five thousand ($5,000.00) Dollars to be paid to the said George Bombolis, his executors or administrators, to which payment well and truly to be made we bind ourselves and each of us jointly and severally, and our and each of our successors, representatives and assigns firmly by these presents.

Sealed with our seals and dated this 16th day of April, 1915.

Whereas, Lately at a session of the Supreme Court of the State of Minnesota in a suit pending in said court between George Bombolis, as administrator of the Estate of Constantine Nanons, alias Gust Nanos, Deceased, Respondent, and The Minneapolis & St. Louis Railroad Company, Appellant, a final judgment was rendered against the said Appellant, and the said The Minneapolis & St. Louis Railroad Company, Appellant, having obtained from said court a Writ of Error to reverse the judgment in the aforesaid suit, and a citation addressed to the said George Bombolis, as Administrator of the Estate of Constantine Nanos, Alias Gust Nanos, deceased, is about to be issued citing and admonishing him to be and appear at a Supreme Court of the United States at Washington within thirty (30) days from the date thereof.

Now the condition of the above *application* is such that if the said The Minneapolis & St. Louis Railroad Company shall prosecute its Writ of Error to effect, and shall answer all damages and costs that may be awarded against it if it fails to make this appeal good, then the above obligation to be void, otherwise to remain in full force and virtue.

THE MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, [SEAL.]
By F. M. MINER,
Its General Attorney.
UNITED STATES FIDELITY & GUARANTY CO., [SEAL.]
By WIRT WILSON AND
GEORGE E. MURPHY,
Its Attorneys-in-Fact.

In the presence of
E. S. REDEL.
A. M. REDEL.
MAXWELL SUSSMAN.
L. O. DONNELL.

Allowed by

CALVIN L. BROWN,
Chief Justice of the Supreme Court of Minnesota.

255 STATE OF MINNESOTA,
County of Hennepin, ss:

On this 16th day of April 1915, before me, a Notary Public within and for said County and State, personally appeared Wirt Wilson and George E. Murphy, to me personally known, who being by me duly sworn upon oath did say that they are the Agents and Attorneys-in-fact of and for the United States Fidelity and Guaranty Company, a corporation of Baltimore, Maryland, created, organized and existing under and by virtue of the laws of the State of Maryland; that the corporate seal affixed to the foregoing within instrument is the seal of said Company; that the said seal was affixed and the said instrument was executed by authority of its Board of Directors; and the said Wirt Wilson and George E. Murphy did acknowledge that they executed the said instrument as the free act and deed of said Company.

[SEAL.] MAXWELL SUSSMAN,
Notary Public, Hennepin County, Minnesota.

My commission expires November 18, 1920.

STATE OF MINNESOTA,
County of Hennepin, ss:

On this 16th day of April, 1915, before me appeared F. M. Miner to me personally known, who, being by me duly sworn, did say that he is the General Attorney of The Minneapolis & St. Louis Railroad Company, that the seal affixed to the foregoing instrument is the corporate seal of said corporation, and that said instrument was executed in behalf of said corporation, by authority of its board of directors; and said F. M. Miner acknowledged said instrument to be the free act and deed of said corporation.

[SEAL.] E. S. REDEL,
Notary Public, Hennepin County, Minn.

My commission expires June 19, 1917.

(Endorsed:) Filed Apr. 23, 1915. I. A. Caswell, Clerk.

256 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Supreme Court of the State of Minnesota, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment on an appeal which is in the said Supreme Court of the State of Minnesota before you, or some of you, being the highest court of law or equity of the said state in which a decision could be had in the said suit between The Minneapolis & St. Louis Railroad Company, Appellant and Plaintiff in Error and George Bombolis, as Administrator of the Estate of Constantine Nanos, alias Gust Nanos, deceased, Respondent and Defendant in Error, wherein was drawn in question the validity of a treaty or statute of and of an authority exercised under said statute on the ground of their being repugnant to the constitution, treaties or laws of the United States and the decision was in favor of such their validity, or wherein was drawn in question the validity of a treaty or statute of, and of authority exercised under the laws of the United States, and the decision was against their validity; or wherein was drawn in question the construction of a clause of the constitution or a treaty or statute of or commission held under the United States, and the decision was against the title, right, privilege or exemption specially set up or claimed under said clause of the constitution, treaty, statute or commission, a manifest error hath happened to the great damage of the said The Minneapolis & St. Louis Railroad Company as by its complaint appears.

We being willing that error, if any hath been, shall be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal distinctly and openly you send the record and proceedings aforesaid with all things concerning the same to the Supreme Court of the United States, together with this writ so that you may have the same at Washington within thirty days
257 (30) from the date thereof in the said Supreme Court; that the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the constitution and the laws of the United States should be done.

Witness, The Honorable Edward Douglass White, Chief Justice of the United States this 19th day of April, 1915.

Done in the City of St. Paul, County of Ramsey under the seal of the District Court of the United States for the District of Minnesota, attached.

[U. S. Dist. Court Seal, Dist. of Minnesota, Third Division.]

CHARLES L. SPENCER,
Clerk of the District Court of the United States for the District of Minnesota.

Allowed by:
CALVIN L. BROWN,
Chief Justice of the Supreme Court of Minnesota.

Service of the within Writ of Error, and receipt of a copy thereof admitted this 19th day of April, 1915.

GEO. B. LEONARD,
Solicitor for George Bombolis,
Defendant in Error.

[Endorsed:] 18922. Original. State of Minnesota, County of —, Supreme Court. Geo. Bombolis, as Adm'r Est. Constantine Nanos, alias Gust Nanos, deceased, Respondent, vs. M. & St. L. R. R. Appellant. Due service of the within by copy is hereby admitted at — this — day of ——, A. D. 19—. —— ——, Attorney for —. W. H. Bremner, F. M. Miner, Attorneys for Appellant, 1104 Metropolitan Life Bldg., Minneapolis, Minn. Filed Apr. 23, 1915. I. A. Caswell, Clerk.

258 *Certificate of Lodgment.*

STATE OF MINNESOTA,
Supreme Court, ss:

I, I. A. Caswell, clerk of said court, do hereby certify that there was lodged with me as such clerk on the 23rd day of April, 1915, in the within entitled case;

1. The original bond, of which a copy is herein set forth;
2. Copies of the writ of error, as herein set forth—one for defendant in error and one to file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the said court at my office, in St. Paul, Minnesota, this 10th day of May, 1915.

[Seal of the Supreme Court, State of Minnesota.]

I. A. CASWELL,
Clerk Supreme Court of Minnesota.

259 UNITED STATES OF AMERICA, *ss:*

The President of the United States to George Bombolis, Greetings:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington within thirty (30) days from the date hereof, pursuant to a Writ of Error filed in the Clerk's office of the Supreme Court of the State of Minnesota, wherein The Minneapolis & St. Louis Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the decision rendered against the said plaintiff in error, as in the writ of error mentioned, should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness, The Honorable Calvin M. Brown, Chief Justice of the Supreme Court of the State of Minnesota, this 19th day of April, A. D. 1915.

CALVIN L. BROWN,
Chief Justice of the Supreme Court of Minnesota.

Service of the within citation and receipt of a copy thereof admitted this 19th day of April, A. D. 1915.

GEO. B. LEONARD,
Solicitor for George Bombolis, Adm'r,
Defendant in Error.

[Endorsed:] 18922. Original. State of —, County of —, — Court. Geo. Bombolis, as Adm'r Est. Constantine Nanos, alias Gust Nanos, deceased, Defendant in Error, vs. M. & St. L. Plaintiff in Error. Citation. Due service of the within by copy is hereby admitted at — this — day of ——, A. D. 19—. —— ——, Attorney for —. W. H. Bremner, F. M. Miner, Attorneys for —, 1104 Metropolitan Life Bldg., Minneapolis, Minn. Filed Apr. 23, 1915. I. A. Caswell, Clerk.

260 *Return to Writ.*

UNITED STATES OF AMERICA,
Supreme Court of Minnesota, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In Witness Whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court of Minnesota, in the city of St. Paul, Minnesota, this 10th day of May, 1915.

[Seal of the Supreme Court, State of Minnesota.]

I. A. CASWELL,
Clerk Supreme Court of Minnesota.

Costs of transcript $—, paid by The Minneapolis & St. Louis Railroad Company.

Endorsed on cover: File No. 24,745. Minnesota Supreme Court. Term No. 478. The Minneapolis & St. Louis Railroad Company, plaintiff in error, vs. George Bombolis, as administrator of the estate of Constantine Nanos, alias Gust Nanos, deceased. Filed May 24, 1915. File No. 24,745.

19

Office Supreme Court, U. S.
FILED
MAR 6 1916
JAMES D. MAHER
CLERK

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1915.

No. 478.

MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY,

v.

GEORGE BOMBOLIS, ADMINISTRATOR.

MOTION OF THE MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, TO ADVANCE.

APPEALS PRESS, INC., RICHMOND, VA.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1915.

No. 478.

MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY,

v.

GEORGE BOMBOLIS, ADMINISTRATOR.

MOTION OF THE MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, TO ADVANCE.

Come now counsel for the Minneapolis & St. Louis Railroad Company and move the court to advance the above entitled cause to be heard at the same time with the case of *The Chesapeake and Ohio Railway Company* v. *Kelly's Administratrix, No.* 321, *October Term*, 1915.

The court having advanced the causes of—

St. L. & S. F. R. Co. v. *Brown*, No. 399,
C. & O. Ry. v. *Dwyer*, No. 453,
L. & N. R. Co. v. *Stewart's Admx.*, No. 485,
C. & O. Ry. Co. v. *Carnahan*, No. 743.

to be heard at the same time with *C. & O. Ry. Co.* v. *Kelly's Admx.*, No. 321, the court is respectfully asked to advance this case, No. 478, to be heard with the above cases, this case having the same question, in reference to the Seventh Amendment to the Constitution of the United States, as is presented in the aforementioned cases, viz: whether the Seventh Amendment of the Constitution of the United States is a restraint upon Congress and prevents Congress from committing to the State courts for trial causes of action under the Federal Employers' Liability Act in States where jury trial as preserved in the Seventh Amendment is no longer preserved. Stated in another way, the question is whether State courts in such of the States as have jury trials by fractional verdicts, or by less than a common law jury, are appropriate, adequate, and competent courts to try causes under said Federal Employers' Liability Act. An early determination of this question is necessary to designate the *fori* wherein these causes of action shall be entertained. Public interests are, accordingly, involved. The consolidation of these six cases to be heard together will sacrifice no interest of the litigants, the Constitutional question being common to all six cases.

WILLIAM H. BREMNER,
FREDERICK M. MINER.
Of Counsel for the Minneapolis
& St. Louis Railroad Company.

To Counsel for defendant in error, in
M. & St. L. R. Co., Plaintiff in Error, v. *Geo. Bombolis as Admx.*, No. 478.

Sirs:

Please take notice that a motion will be made at a session of this court to be held on the 6th day of March, 1916, at 12 o'clock noon, or as soon thereafter as counsel can be

heard, to advance said case of *Minneapolis & St. Louis R. Co., Plaintiff in Error* v. *Geo. Bombolis, as Admx. Defendant in Error*, No. 478, to be heard with the case of *The Chesapeake and Ohio Railway Company* v. *Kelly, Administratrix*, No. 321, October Term, 1915.

WILLIAM H. BREMNER,
FREDERICK M. MINER.
Counsel for Plaintiff in Error.

To GEO. B. LEONARD,
Counsel for Defendant in Error.

The above notice is accepted and concurred in, this 24th day of February, 1916.

GEO B. LEONARD,
Counsel for Defendant in Error.

Office Supreme Court, U. S.
FILED
MAR 6 1916
JAMES D. MAHER
CLERK

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1915.

No. 478.

MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY,

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GEORGE BOMBOLIS, ADMINISTRATOR.

MOTION OF THE MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, TO ADVANCE.

Come now counsel for the Minneapolis & St. Louis Railroad Company and move the court to advance the above entitled cause to be heard at the same time with the case of *The Chesapeake and Ohio Railway Company* v. *Kelly's Administratrix, No.* 321, *October Term,* 1915.

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to be heard at the same time with *C. & O. Ry. Co.* v. *Kelly's Admx.*, No. 321, the court is respectfully asked to advance this case, No. 478, to be heard with the above cases, this case having the same question, in reference to the Seventh Amendment to the Constitution of the United States, as is presented in the aforementioned cases, viz: whether the Seventh Amendment of the Constitution of the United States is a restraint upon Congress and prevents Congress from committing to the State courts for trial causes of action under the Federal Employers' Liability Act in States where jury trial as preserved in the Seventh Amendment is no longer preserved. Stated in another way, the question is whether State courts in such of the States as have jury trials by fractional verdicts, or by less than a common law jury, are appropriate, adequate, and competent courts to try causes under said Federal Employers' Liability Act. An early determination of this question is necessary to designate the *fori* wherein these causes of action shall be entertained. Public interests are, accordingly, involved. The consolidation of these six cases to be heard together will sacrifice no interest of the litigants, the Constitutional question being common to all six cases.

WILLIAM H. BREMNER,
FREDERICK M. MINER.
Of Counsel for the Minneapolis
& St. Louis Railroad Company.

To Counsel for defendant in error, in
M. & St. L. R. Co., Plaintiff in Error, v. *Geo. Bombolis as Admx.*, No. 478.

Sirs:

Please take notice that a motion will be made at a session of this court to be held on the 6th day of March, 1916, at 12 o'clock noon, or as soon thereafter as counsel can be

heard, to advance said case of *Minneapolis & St. Louis R. Co., Plaintiff in Error* v. *Geo. Bombolis, as Admx. Defendant in Error*, No. 478, to be heard with the case of *The Chesapeake and Ohio Railway Company* v. *Kelly, Administratrix*, No. 321, October Term, 1915.

WILLIAM H. BREMNER,
FREDERICK M. MINER.
Counsel for Plaintiff in Error.

To GEO. B. LEONARD,
Counsel for Defendant in Error.

The above notice is accepted and concurred in, this 24th day of February, 1916.

GEO B. LEONARD,
Counsel for Defendant in Error.

MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY *v.* BOMBOLIS, ADMINISTRATOR OF NANOS.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 478. Argued April 19, 20, 1916.—Decided May 22, 1916.

The Seventh Amendment exacts a trial by jury according to the course of the common law, that is, by a unanimous verdict.

The first ten Amendments are not concerned with state action and deal only with Federal action.

The Seventh Amendment applies only to proceedings in courts of the United States; it does not in any manner govern or regulate trials by jury in state courts, nor does it apply to an action brought in the state court under the Federal Employers' Liability Act.

A verdict in a state court in an action under the Employers' Liability Act, which is not unanimous, but which is legal under the law of the State, is not illegal as violating the Seventh Amendment.

While a state court may enforce a right created by a Federal statute,

such court does not, while performing that duty, derive its authority as a court from the United States but from the State, and the Seventh Amendment does not apply to it.

128 Minnesota, 112, affirmed.

THE facts, which involve the validity of a verdict and judgment under the Employers' Liability Act and the application and effect of the Seventh Amendment in suits in the state courts under that Act, are stated in the opinion.

Mr. Frederick M. Miner, with whom *Mr. William H. Bremner* was on the brief, for plaintiff in error: [1]

The right of trial by jury which is secured to all persons subject to the jurisdiction of the United States, by the pro-

[1] The question of the Seventh Amendment as affecting Federal Employers' Liability cases in state courts was involved in several cases which were simultaneously argued on April 19, 20, 1916 (see pp. 218, 219, *post*), and in which a joint brief was filed for the various plaintiffs in error by Mr. Jno. T. Shelby, Mr. E. L. Worthington, Mr. W. D. Cochran, Mr. Le Wright Browning, Mr. David H. Leake and Mr. Walter Leake for Chesapeake & Ohio Railway, Mr. W. F. Evans for St. Louis & San Francisco Railroad, Mr. William H. Bremner and Mr. Frederick M. Miner for Minneapolis & St. Louis Railway, Mr. Benjamin D. Warfield for Louisville & Nashville Railroad, and a joint brief was filed for the various defendants in error by Mr. Ed. C. O'Rear and Mr. B. G. Williams for Kelly, Adm'x, Mr. C. B. Stuart, Mr. A. C. Cruce and Mr. M. K. Cruce for Brown, Mr. R. S. Dinkle and Mr. George B. Martin for Gainey, Adm'r, Mr. George B. Leonard for Bombolis, Adm'r, Mr. B. F. Procter, Mr. George H. Lamar, Mr. C. U. McElroy and Mr. D. W. Wright for Stewart's Adm'r, Mr. C. W. Allen and Mr. H. W. Walsh for Carnahan.

The cases were orally argued by Mr. Benjamin D. Warfeld, Mr. David H. Leake and Mr. Frederick M. Miner for the various plaintiffs in error, and by Mr. Edward C. O'Rear and Mr. George H. Lamar for the various defendants in error.

These cases are as follows: *Minneapolis & St. Louis R. R.* v. *Bombolis; St. Louis & San Francisco Railroad* v. *Brown, post*, p. 223; *Chesapeake & Ohio Railway* v. *Carnahan, post*, p. 241; *Louisville & Nashville Railroad* v. *Stewart, post*, p. 261; *Chesapeake & Ohio Railway* v. *Kelly's Administrator, post*, p. 000; *Chesapeake & Ohio Railway* v. *Gainey, post*, p. 000.

visions of the Seventh Amendment, means a jury of twelve men who must, in finding facts, act unanimously. *Am. Publishing Co.* v. *Fisher*, 166 U. S. 464; *Springville* v. *Thomas*, 166 U. S. 707; *Capital Traction Co.* v. *Hof*, 174 U. S. 1.

The "right," which is secured by the Seventh Amendment is not a matter of procedure but of substance, and one possessing such right cannot be deprived of it by any means short of an amendment to the Constitution. Cases, *supra*, and *Walker* v. *New Mexico &c. R. R.*, 165 U. S. 593; *Slocum* v. *N. Y. L. Ins. Co.*, 228 U. S. 364.

The Seventh Amendment is a limitation upon all of the powers delegated by the Constitution, to those agencies which comprise the government of the United States; therefore, not only the courts but the legislature of the United States is limited by this Amendment, and the right secured thereby enters into and controls all suits founded upon legislation enacted by Congress in whatever court the same may be brought, where such court sits and exercises power within the domain of the United States. Cases, *supra*, and *Walker* v. *Southern P. R. Co.*, 165 U. S. 595; *Bauman* v. *Ross*, 167 U. S. 592; *Thompson* v. *Utah*, 170 U. S. 343, 350; *Guthrie Bank* v. *Guthrie*, 173 U. S. 528–537; *Maxwell* v. *Dow*, 176 U. S. 581, 596; *Black* v. *Jackson*, 177 U. S. 349; *Downes* v. *Bidwell*, 182 U. S. 244, 270; *Rassmussen* v. *United States*, 197 U. S. 516, 526; *Second Employers' Liability Cases*, 223 U. S. 1, 55; *Cent. Vermont R. R.* v. *White*, 238 U. S. 507; *Atl. Coast Line* v. *Burnette*, 239 U. S. 199.

A state court can derive no authority from the power which creates it to adjudicate controversies based upon the Federal act. *Ableman* v. *Booth*, 21 How. 506; *Levin* v. *United States*, 128 Fed. Rep. 826.

The principles of law comprised within the term comity, by which courts entertain controversies involving rights created by sovereign power, other than that which created such courts, do not afford the basis or ground upon which

state courts may exercise their powers in controversies founded upon the Federal act. *Claflin* v. *Houseman*, 93 U. S. 130; *Second Employers' Liability Cases*, 223 U. S. 1.

The dictum, to the effect that the principle of comity by analogy may be involved in this question, is inadmissible, and with due respect, seems to involve a contradiction. *Zikos* v. *Oregon R. & N. Co.*, 179 Fed. Rep. 893.

When "comity" is the basis of judicial determination the court extending the comity out of favor and good will, extends to foreign laws an effect they would not otherwise have. *Stowe* v. *Belfast Bank*, 92 Fed. Rep. 90, 96. But its obligation is not imperative. *Mast, Foos & Co.* v. *Stover Mfg.*, 177 U. S. 485. See also *Hilton* v. *Guyot*, 159 U. S. 113; *People* v. *Martin*, 175 N. Y. 315.

Congress in the legitimate exercise of the power conferred upon it may withhold jurisdiction to try causes founded upon laws passed by it, or can confer exclusive jurisdiction with respect to such matters upon the Federal courts. *Claflin* v. *Houseman*, 93 U. S. 130; *The Moses Taylor*, 4 Wall. 411.

Congress may not, however, withhold from people subject to the jurisdiction of the United States, and whose rights are controlled by the Federal Employers' Liability Act, the protection offered by the Seventh Amendment.

State courts in deciding controversies founded upon this act are applying the judicial power of the United States, and if it be held that the Seventh Amendment is a limitation only upon that power, state courts could not enforce such power apart from the limitation of the said amendment. *McCulloch* v. *Maryland*, 4 Wheat. 316; *Cohens* v. *Virginia*, 6 Wheat. 414.

The judicial power of the United States is co-extensive with its legislative power. *Cohens* v. *Virginia*, *supra*.

If a case is not within the judicial power of the United States an appeal would not lie to this court, for it is self-evident that one sovereign power cannot exercise super-

vision over the judiciary of another. *Martin* v. *Hunter*, 1 Wheat. 304; *Cohens* v. *Virginia*, *supra*.

A substantive right or defense arising under the Federal law cannot be lessened or destroyed by a rule of procedure. *Norfolk &c. R. R.* v. *Ferebee*, 238 U. S. 269. Nor can a right protected by the Constitution of the United States be lessened or destroyed by a state court, under the guise of procedure.

Mr. George H. Lamar, with whom *Mr. B. F. Proctor*, *Mr. C. U. McElroy* and *Mr. D. W. Wright* were on the brief, for defendant in error.

Mr. Chief Justice White delivered the opinion of the court.

Counting upon the Employers' Liability Act of 1908 (c. 149, 35 Stat. 65) as amended by the act of 1910 (c. 143, 36 Stat. 291), the defendant in error sued in a state court to recover for the loss resulting from the death of Nanos, his intestate, alleged to have been occasioned by the negligence of the plaintiff in error while he, Nanos, was in its employ and engaged in interstate commerce.

Whatever may have been the controversies in the trial court prior to the verdict of the jury in favor of the plaintiff and the contentions which were unsuccessfully urged in the court below to secure a reversal of the judgment entered thereon, on this writ of error they have all but one been abandoned and hence have all but one become negligible. As the one question here remaining was also involved in five other cases pending under the Employers' Liability Act on writs of error to the courts of last resort of Virginia, Kentucky and Oklahoma, those cases and this were argued together. As the other cases however involve additional questions, we dispose separately of this case in order to decide in this the one question which is common to them all and thus enable the other cases,

if we deem it is necessary to do so, to be treated in separate opinions.

By the constitution and laws of Minnesota in civil causes after a case has been under submission to a jury for a period of twelve hours without a unanimous verdict, five-sixths of the jury are authorized to reach a verdict which is entitled to the legal effect of a unanimous verdict at common law. When in the trial of this case the court instructed the jury as to their right to render a verdict under such circumstances, the defendant company objected on the ground that as the cause of action against it arose under the Federal Employers' Liability Act—in other words, was Federal in character—the defendant was by the Seventh Amendment to the Constitution of the United States entitled to have its liability determined by a jury constituted and reaching its conclusion according to the course of the common law, and hence to apply the state statute would be repugnant to the Seventh Amendment. This objection which was overruled and excepted to was assigned as error in the court below, was there adversely disposed of (128 Minnesota, 112), and the alleged resulting error concerning such action is the one question which we have said is now urged for reversal.

It has been so long and so conclusively settled that the Seventh Amendment exacts a trial by jury according to the course of the common law, that is, by a unanimous verdict (*American Publishing Co.* v. *Fisher*, 166 U. S. 464; *Springville* v. *Thomas*, 166 U. S. 707; *Capital Traction Co.* v. *Hof*, 174 U. S. 1), that it is not now open in the slightest to question that if the requirements of that Amendment applied to the action of the State of Minnesota in adopting the statute concerning a less than unanimous verdict or controlled the state court in enforcing that statute in the trial which is under review, both the statute and the action of the court were void because of repugnancy to the Constitution of the United States. The one

question to be decided is therefore reduced to this: Did the Seventh Amendment apply to the action of the state legislature and to the conduct of the state court in enforcing at the trial the law of the State as to what was necessary to constitute a verdict?

Two propositions as to the operation and effect of the Seventh Amendment are as conclusively determined as is that concerning the nature and character of the jury required by that Amendment where applicable. (a) That the first ten Amendments, including of course the Seventh, are not concerned with state action and deal only with Federal action. We select from a multitude of cases those which we deem to be leading. *Barron* v. *Baltimore*, 7 Pet. 243; *Fox* v. *Ohio*, 5 How. 410, 434; *Twitchell* v. *Commonwealth*, 7 Wall. 321; *Brown* v. *New Jersey*, 175 U. S. 172, 174; *Twining* v. *New Jersey*, 211 U. S. 78, 93. And, as a necessary corollary, (b) that the Seventh Amendment applies only to proceedings in courts of the United States and does not in any manner whatever govern or regulate trials by jury in state courts or the standards which must be applied concerning the same. *Livingston* v. *Moore*, 7 Pet. 469, 552; *The Justices* v. *Murray*, 9 Wall. 274; *Edwards* v. *Elliott*, 21 Wall. 532; *Walker* v. *Sauvinet*, 92 U. S. 90; *Pearson* v. *Yewdall*, 95 U. S. 294. So completely and conclusively have both of these principles been settled, so expressly have they been recognized without dissent or question almost from the beginning in the accepted interpretation of the Constitution, in the enactment of laws by Congress and proceedings in the Federal courts, and by state constitutions and state enactments and proceedings in the state courts, that it is true to say that to concede that they are open to contention would be to grant that nothing whatever had been settled as to the power of state and Federal governments or the authority of state and Federal courts and their mode of procedure from the beginning. Doubtless it was

this view of the contention which led the Supreme Court of Minnesota in this case and the courts of last resort of the other States in the cases which were argued with this to coincide in opinion as to the entire want of foundation for the proposition relied upon, and in the conclusion that to advance it was virtually to attempt to question the entire course of judicial ruling and legislative practice both state and National which had prevailed from the commencement. And it was of course presumably an appreciation of the principles so thoroughly settled which caused Congress in the enactment of the Employers' Liability Act to clearly contemplate the existence of a concurrent power and duty of both Federal and state courts to administer the rights conferred by the statute in accordance with the modes of procedure prevailing in such courts. Indeed, it may not be doubted that it must have been the same point of view which has caused it to come to pass that during the number of years which have elapsed since the enactment of the Employers' Liability Act and the Safety Appliance Act and in the large number of cases which have been tried in state courts growing out of the rights conferred by those acts, the judgments in many of such cases having been here reviewed, it never entered the mind of anyone to suggest the new and strange view concerning the significance and operation of the Seventh Amendment which was urged in this case and the cases which were argued with it.

Under these circumstances it would be sufficient to leave the unsoundness of the proposition to the demonstration to result from the application of the previous authoritative rulings on the subject and the force of the reasoning inherently considered upon which they were based, as also upon its convincing power so aptly portrayed by the opinions of the courts below in this and the other cases which we have said were argued along with this. *Ches. & Ohio Ry.* v. *Carnahan*, a Virginia case; *Ches. & Ohio*

Ry. v. *Kelly*, 160 Kentucky, 296; 161 Kentucky, 655; *Louis & Nash. R. R.* v. *Stewart*, 163 Kentucky, 823; *St. Louis & San Fran. R. R.* v. *Brown*, an Oklahoma case. (See note, p. 212, *ante*.) In view, however, of the grave misconception of the very fundamentals of our constitutional system of government which is involved in the proposition relied upon and the arguments seeking to maintain it, and the misapplication of the adjudged cases upon which the arguments rest, while not implying that the question is an open one, we nevertheless notice a few of the principal propositions relied upon.

1. It is true as pointed out in *Walker* v. *New Mexico & S. P. R. R.*, 165 U. S. 593, and in *Am. Publishing Co.* v. *Fisher*, 166 U. S. 464, that the right to jury trial which the Seventh Amendment secures is a substantial one in that it exacts a substantial compliance with the common-law standard as to what constitutes a jury. But this truth has not the slightest tendency to support the contention that the substantial right secured extends to, and is operative in, a field to which it is not applicable and with which it is not concerned. It is also true, as pointed out in the cases just cited, that although territorial courts of the United States are not constitutional courts, nevertheless as they are courts created by Congress and exercise jurisdiction alone by virtue of power conferred by the law of the United States, the provisions of the Seventh Amendment are applicable in such courts. But this affords no ground for the proposition that the Amendment is applicable and controlling in proceedings in state courts deriving their authority from state law, in the teeth of the express and settled doctrine that the Amendment does not relate to proceedings in such courts.

2. The proposition that as the Seventh Amendment is controlling upon Congress, its provisions must therefore be applicable to every right of a Federal character created by Congress and regulate the enforcement of

such right, but in substance creates a confusion by which the true significance of the Amendment is obscured. That is, it shuts out of view the fact that the limitations of the Amendment are applicable only to the mode in which power or jurisdiction shall be exercised in tribunals of the United States, and therefore that its terms have no relation whatever to the enforcement of rights in other forums merely because the right enforced is one conferred by the law of the United States. And of course it is apparent that to apply the constitutional provision to a condition to which it is not applicable would be not to interpret and enforce the Constitution, but to distort and destroy it.

Indeed, the truth of this view and the profound error involved in the contention relied upon is aptly shown by the further propositions advanced in argument and based upon the premise insisted upon. Thus, it is urged that if the limitation of the Amendment applies to Congress so as to prevent that body from creating a court and giving it power to act free from the restraints of the Amendment, it must also apply, unless the substance is to be disregarded and the shadow be made controlling, to the power of Congress to create a right and leave the power to enforce it in a forum to which the constitutional limitation is not applicable. But this again enlarges the Amendment by causing it not merely to put a limitation upon the power of Congress as to the courts, constitutional or otherwise, which it deems fit to create, but to engraft upon the power of Congress a limitation as to every right of every character and nature which it may create, or, what is equivalent thereto, to cast upon Congress the duty of subjecting every right created by it to a limitation that such right shall not be susceptible of being enforced in any court whatever, whether created by Congress or not, unless the court enforcing the right becomes bound by the restriction which the Amendment establishes. It is

true that the argument does not squarely face the contention to which it reduces itself since it is conceded that rights conferred by Congress, as in this case, may be enforced in state courts; but it is said this can only be provided such courts in enforcing the Federal right are to be treated as Federal courts and be subjected *pro hac vice* to the limitations of the Seventh Amendment. And of course if this principle were well founded, the converse would also be the case, and both Federal and state courts would by fluctuating hybridization be bereft of all real, independent existence. That is to say, whether they should be considered as state or as Federal courts would from day to day depend not upon the character and source of the authority with which they were endowed by the government creating them, but upon the mere subject-matter of the controversy which they were considering.

But here again the error of the proposition is completely demonstrated by previous adjudications. *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 330; *Houston* v. *Moore*, 5 Wheat. 1, 27–28; *Ex parte McNiel*, 13 Wall. 236, 243; *Claflin* v. *Houseman*, 93 U. S. 130; *Robertson* v. *Baldwin*, 165 U. S. 275; *Mondou* v. *New York, New Haven & Hartford R. R.*, 223 U. S. 1, 55–59. Moreover the proposition is in conflict with an essential principle upon which our dual constitutional system of government rests, that is, that lawful rights of the citizen, whether arising from a legitimate exercise of state or national power, unless excepted by express constitutional limitation or by valid legislation to that effect, are concurrently subject to be enforced in the courts of the State or nation when such rights come within the general scope of the jurisdiction conferred upon such courts by the authority, State or nation, creating them. This principle was made the basis of the first Federal Judiciary Act and has prevailed in theory and practice ever since as to rights of every character, whether derived from constitutional grant or legisla-

tive enactment, state or national. In fact this theory and practice is but an expression of the principles underlying the Constitution and which cause the governments and courts of both the Nation and the several States not to be strange or foreign to each other in the broad sense of that word, but to be all courts of a common country, all within the orbit of their lawful authority being charged with the duty to safeguard and enforce the right of every citizen without reference to the particular exercise of governmental power from which the right may have arisen, if only the authority to enforce such right comes generally within the scope of the jurisdiction conferred by the government creating them. And it is a forgetfulness of this truth which doubtless led to the suggestion made in the argument that the ruling in *Mondou* v. *New York, New Haven & Hartford R. R.*, 223 U. S. 1, had overthrown the ancient and settled landmarks and had caused state courts to become courts of the United States exercising a jurisdiction conferred by Congress, whenever the duty was cast upon them to enforce a Federal right. It is true in the *Mondou Case* it was held that where the general jurisdiction conferred by the state law upon a state court embraced otherwise causes of action created by an act of Congress, it would be a violation of duty under the Constitution for the court to refuse to enforce the right arising from the law of the United States because of conceptions of impolicy or want of wisdom on the part of Congress in having called into play its lawful powers. But that ruling in no sense implied that the duty which was declared to exist on the part of the state court depended upon the conception that for the purpose of enforcing the right the state court was to be treated as a Federal court deriving its authority not from the State creating it, but from the United States. On the contrary the principle upon which the *Mondou Case* rested, while not questioning the diverse governmental sources from

which state and national courts drew their authority, recognized the unity of the governments, national and state, and the common fealty of all courts, both state and national, to both state and national constitutions, and the duty resting upon them, when it was within the scope of their authority, to protect and enforce rights lawfully created, without reference to the particular government from whose exercise of lawful power the right arose.

Affirmed.